158-346

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 289.

THE UNITED STATES, APPELLANT,

vs.

THOMAS SMITH.

FILED SEPTEMBER 14, 1894.

No. 345.

THOMAS SMITH, APPELLANT,

vs.

THE UNITED STATES.

FILED NOVEMBER 23, 1894.

APPEALS FROM THE COURT OF CLAIMS.

(14839 and 14933.)

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A *Memorandum.*

Original petition filed Jan. 8, 1889. Traverse filed Jan. 31, 1889.

1 *Amended petition.*—Filed May 21, 1891.

In the United States Court of Claims.

THOMAS SMITH
vs.
THE UNITED STATES. } No. 16428.

Amended petition.

The claimant in this, his amended petition, respectfully shows to the court as follows:

1. That he is a citizen of the United States and a resident of the city of Santa Fe in the Territory of New Mexico.

2. That he was the properly commissioned, qualified, and acting district attorney for the United States for the said Territory of New Mexico from January 1, 1886, to December 31, 1887, both dates inclusive, and that he fully discharged his duties as such district attorney during said period to the best of his ability.

3. That in and for the discharge of said duties he became entitled from the United States to certain fees and emoluments by reason (a) of the statutes which fix and declare the compensation the district attorney shall receive for certain services, and by reason (b) of the action of the Attorney-General, who is authorized and empowered in his discretion specially to employ and pay a district attorney for services not covered by his salary or fees.

4. That under the first subdivision (numbered a), named in the preceding paragraph, he became entitled to $11,546, the same being made up as follows:

2 In the year 1886:

Per diem charges of $10 each for attendance on sessions of the courts of the United States	$2,070.00	
Mileage charges of 20 cents a mile for travel performed in the discharge of official duty	474.00	
Salary	250.00	
Docket fees and such other charges as are authorized to a district attorney	2,420.00	
		$5,214.00

In the year 1887:

Per diem charges of $10 each for attendance on sessions of courts of the United States	$2,040.00	
Mileage charges of 20 cents a mile for travel performed in the discharge of official duty	372.00	
Salary	250.00	
Docket fees and such other charges as are authorized to a district attorney	3,670.00	
		$6,332.00

5. That he duly made out his accounts against the United States for the said $11,546 and that his accounts so made out, having been passed upon and approved by the proper court as provided in the act of Congress of February 22, 1875, (18 Stat. at L., 333), were presented to the accounting officers of the Treasury Department for settlement, and that said

accounting officers, after an examination thereof, duly admitted the same to be correct as above set forth.

6. That of the aforesaid $11,546, he was duly paid $9,428.42, the same consisting of payments as follows:

In the year 1886:	
Docket fees, &c	$2,420.00
3 Salary	$250.00
Per diems	1,504.10
	$4,174.10
In the year 1887:	
Docket fees, &c	3,670.00
Salary	250.00
Per diems	1,334.32
	$5,254.32

Thus leaving $2,117.58 unpaid, this unpaid part consisting of the following items:

In the year 1886:	
Mileage	$474.00
Per diems	565.90
In the year 1887:	
Mileage	372.00
Per diems	705.68
	$2,117.58

7. That under the second subdivision (numbered b) of paragraph 3, he performed services under the special direction and employment of the Attorney-General in the following cases to wit:

Case vs. Zuni Indians, Stoneroad vs. Stoneroad, case vs. Lieut. H. A. Benson, Pueblo de Acoma vs. Saint et al., Pueblo de Acoma vs. Saint et al., United States vs. Canon del Agua Company, San Marcial Land Company vs. Armijo.

That he duly made out account for the services rendered in the
4 said cases and presented the same to the district court of the United States for the said Territory and proved the same in open court; and that the said court thereupon made orders approving the said accounts to the extent of $1,910, and caused the said orders to be entered of record, as follows to wit:

Case vs. Zuni Indians	$500.00
Stoneroad vs. Stoneroad	100.00
Case vs. Lieut. H. A. Benson	560.00
Pueblo de Acoma vs. Saint, et al	25.00
Pueblo de Acoma vs. Saint, et al	75.00
United States vs. Canon del Agua Company	500.00
San Marcial Land Company vs. Armijo	150.00
	$1,910.00

8. That he thereafter presented the said accounts to the Attorney-General, who approved the same, and directed them to be paid in the following amounts, to wit:

Case vs. Zuni Indians	$300.00
Case vs. Lieut. H. A. Benson	360.00
Pueblo de Acoma vs. Saint. et al	25.00
Pueblo de Acoma vs. Saint, et al	75.00
United States vs. Canon del Agua Company	450.00
San Marcial Land Company vs. Armijo	100.00
	$1,310.00

And that said accounts, after such approval and direction by the Attorney-General, were duly presented to the accounting officers of the Treasury Department; and that said accounting officers admitted and certified the same to be correct to the extent of $1,315, the same being the amount approved by the Attorney-General and $5 in the case of Stoneroad vs. Stoneroad; and the said accounting officers disallowed $595 of the said accounts, because the same was not approved by the Attorney-General, as follows:

Case vs. Zuni Indians	$200.00
Stoneroad vs. Stoneroad	95.00
Case vs. Lieut. H. A. Benson	200.00
United States vs. Canon del Agua Company	50.00
San Marcial Land Company vs. Armijo	50.00
	$595.00

9. That of the $1,315 thus allowed by the accounting officers $1,090 was duly paid, $300 of the amount thus paid being in and belonging to the year 1886, and $365 being in and belonging to the year 1887; and that $225 of the $1,315 thus allowed remains unpaid, the same belonging $100 to the year 1886 and $125 to the year 1887.

10. The claimant shows further that he made to the Attorney General the returns for the years 1886 and 1887 aforesaid required by section 833 of the Revised Statutes of the United States, and that said returns, after approval thereof by the Attorney-General, were duly referred to the accounting officers of the Treasury Department; and that said accounting officers, disregarding the sums that the claimant had charged himself with in said returns, prepared statements for the said years, respectively, wherein they charged the claimant with all the payments which had been made to him as hereinbefore described, and also with the compensation which they admitted that he had earned, but which was unpaid, as hereinbefore stated.

11. That the accounting officers, having charged him as set forth in the preceding paragraph, credited him in the year 1886 with maximum compensation, $3,500, and with clerk hire and office expenses, $974.10; and in the year 1887 with maximum compensation, $3,500, and with clerk hire and office expenses, $2,119.32; and that the accounting officers, to wit, the Comptroller, refused to certify for payment the whole or any part of the $1,139.90 belonging to the year 1886, or of the $1,202.68 belonging to the year 1887, admitted by them to be correct, as hereinbefore mentioned, but credited the same in the statements here described as "fees earned, but withheld and not payable, being in excess of maximum compensation," and thereupon certified the said statements of official emoluments for the said years to be balanced and closed.

12. The claimant shows that the accounting officers of the Treasury have charged him on his returns of official emoluments, required by section 833 of the Revised Statutes, for the years 1886 and 1887, with the following items as matter proper to be included in said returns and to constitute part of the $3,500 compensation which is mentioned in the act of Congress of August 7, 1882 (22 Stat. at L., 344), to wit: In the year 1886, with special compensation which he received for services not covered by salary or fees, $300; with the per diem allowance which he received, $1,504.10; and in the year 1887, with special compensation which he received for services not covered by salary or fees, $365; with the per diem

allowance which he received, $1,334.32. And that, having charged him with said several items, they declined and still decline to certify for payment either the whole or any part of the $2,342.58, hereinbefore
7 mentioned as earned by claimant, due to him and unpaid, to wit:

In the year 1886:	
Special compensation for services not covered by salary or fees	$100.00
Mileage	474.00
Of per diem compensation	565.90
In the year 1887:	
Special compensation for services not covered by salary or fees	125.00
Mileage	372.00
Of per diem compensation	705.68
	2,342.58

Or of the $595 hereinbefore named as earned by claimant but disallowed by them.

13. The claimant shows further that no action has been taken on his claim other than is set forth in this his petition; that he is the sole and exclusive owner of said claim; that no assignment or transfer of said claim or of any part thereof, or interest therein, has been made; and that he is justly entitled from the United States to the amount claimed in this his petition, without any just credits or offsets.

Wherefore, the premises considered, the claimant demands from the defendant two thousand nine hundred and thirty-seven dollars and fifty-eight cents ($2,937.58); and he prays that the court, from the facts, will find that he is so entitled and give him judgment accordingly.

THOMAS SMITH,
By EPPA HUNTON,
His Attorney.

ss:

8 Eppa Hunton, on oath, says that he is the claimant in the foregoing amended petition by him subscribed, that he is acquainted with the contents of the said petition, and that the facts and matters set forth in said petition are true to the best of his knowledge and belief.

EPPA HUNTON.

Sworn to and subscribed before me this 21 day of May, A. D. 1891.
[SEAL.] JOHN RANDOLPH,
Asst. Clk. Ct. of Claims.

9 *2nd amended petition*—Filed May 21, 1891.

In the United States Court of Claims.

THOMAS SMITH
vs.
THE UNITED STATES. } No. 16684.

Second amended petition.

The claimant, in this his second amended petition, respectfully shows to the court as follows:

1. That he is a citizen of the United States, and a resident of the city of Santa Fe, in the Territory of New Mexico.

2. That he was the properly commissioned, qualified, and acting district attorney of the United States for the said Territory of New Mexico from January 1, 1888, to December 31, 1888, both dates inclusive; and that he fully discharged his duties as such district attorney during said period to the best of his ability.

3. That in and for the discharge of said duties he became entitled from the United States to certain fees and emoluments by reason (a) of the statutes which fix and declare the compensation the district attorney shall receive for certain services, and by reason (b) of the action of the Attorney General, who is authorized and empowered in his discretion specially to employ and pay a district attorney for services not covered by his salary or fees.

4. That under the first subdivision (numbered a) named in the preceding paragraph he became entitled to $5,774.80, made up as follows: $1,750 being per diem charges of $10 each for attendance on sessions of the courts of the United States; $424.80 mileage charges of twenty cents a mile for travel performed in the discharge of official duty; $250 salary, the remaining $3,350 being docket fees and such other charges as are authorized to a district attorney.

5. That he duly made out his accounts against the United States for the said $5,774.80, and that his accounts so made out having been passed upon and approved by the proper courts, as provided in the act of Congress of February 22, 1875 (18 Stat. at L., 333), were presented to the accounting officers of the Treasury Department for settlement, and that said accounting officers, after an examination thereof, duly admitted the same to be correct to the extent of $5,744.80, as follows, to wit:

Per diem charges	$1,720.00
Mileage	424.80
Salary	250.00
Docket fees, &c	3,350.00
	5,744.80

6. That of the aforesaid $5,744.80, so approved and admitted as correct by the accounting officers, he was duly paid $3,747.92, this sum being made up as follows:

Docket fees, &c	$3,350.00
Salary	250.00
Per diem charges	147.92
	3,747.92

Thus leaving $1,996.88 unpaid of the amount which the accounting officers admitted and certified as correct, this unpaid part consisting of the following items:

Mileage charges	$424.80
Per diem compensation	1,572.08
	1,996.88

7. That under the second subdivision (numbered b) of paragraph 3, he performed services under the special direction and employment of the Attorney-General in certain cases, to wit: The San Marcial Land and Improvement Company vs. Mariano Armijo, custodian of Fort Craig Military Reservation, a suit in the district court sitting for territorial purposes; The Peblo de Acoma vs. Saint et al., a suit to protect the Pueblo de Acoma

Indians from the loss of their lands by claimants under a pretended lease; and the United States vs. The Canon del Agua Company, a suit to set aside the company's patent to public lands, the claim of the company resting upon a fraudulently-obtained patent to pretended Mexican grant; and that he presented accounts for said services, and that said accounts were duly approved by the Attorney-General and directed to be paid in the amount of $425; and that said accounts, after such approval and direction, were duly presented to the accounting officers of the Treasury Department; and that said accounting officers admitted and certified to the correctness thereof; and that said accounts were duly paid.

8. The claimant shows further that he made to the Attorney-General the returns for the year 1888 aforesaid, required by section 833 of the Revised Statutes of the United States; and that said returns, after approval thereof by the Attorney-General, were duly referred to the accounting officers of the Treasury Department; and that said accounting officers, disregarding the sums that the claimant had charged him-
12 self with in said returns, prepared a statement wherein they charged the claimant with all the payments which had made to him as hereinbefore described, to wit:

With the docket and other fees	$3. 350. 00
With the salary	250. 00
With the per diems	147. 92
With the special compensation	425. 00
	4, 172. 92

And also with the $1,996.88 which was unpaid, but which was admitted as correct by them, as above stated, to wit, mileage charges, $424.80, and per diem charges, $1,572.08.

9. That the accounting officers, having charged him as set forth in the preceding paragraph, credited him with the maximum compensation, $3,500, and with clerk hire and office expenses, $672.92; but utterly declined to credit him with the expenses of travel and of board and lodging which he had been put to in the discharge of his official duty; and though the claimant, on proper vouchers submitted, repeatedly requested to be credited, in addition to the credits above named, with $100 for actual cost of travel, and $291.25 for actual cost of board and lodging while attending sessions of the courts away from the place of his abode, and $92.77 for actual cost of repairs to office and office furniture, the accounting officers utterly declined to make such credits, and they still refuse to give the claimant the credits thus sought. That the accounting officers, to wit, the Comptroller, refused to certify for payment the whole or any part of the $1,996.88 hereinbefore mentioned, but credited the same, in the statement here described, as "fees earned but withheld and not payable, being in excess of maximum compensation;" and thereupon
13 certified the said statement of official emoluments for the year 1888 to be balanced and closed.

10. The claimant shows that the accounting officers of the Treasury have charged him on his returns of official emoluments, required by section 833 of the Revised Statutes, for the year 1888, with the following items, as matter proper to be included in said returns and to constitute part of the $3,500 compensation which is mentioned in the act of Congress of August 7, 1882 (22 Stat. at L., 344), to wit, with special compensation

which he received for services not covered by salary or fees, $125; and with the per diem allowance which he received, $147.92; and that, having charged him with said items, and denied him credit for the matters and items mentioned in the preceding paragraph of this petition, they declined, and still decline, to certify for payment either the whole or any part of the $1,996.88 hereinbefore mentioned as earned by claimant, due to him and unpaid, and so certified by the accounting officers.

11. The claimant shows further that no action has been taken on his claim other than is set forth in this his petition; that he is the sole and exclusive owner of said claim; that no assignment or transfer of said claim, or of any part thereof, or interest therein, has been made; and that he is justly entitled from the United States to the amount claimed in this his petition, without any just credits or offsets.

Wherefore, the premises considered, the claimant demands from the defendant one thousand nine hundred and ninety-six dollars and eighty-eight cents ($1,996.88); and he prays that the court from the
14 facts will find that he is so entitled, and give him judgment accordingly.

THOMAS SMITH,
By J. ALTHEUS JOHNSON,
Attorney in Fact.

DISTRICT OF COLUMBIA, *ss:*

J. Altheus Johnson, on oath, says that he is the attorney in fact for Thomas Smith, the claimant in the foregoing amended petition; that he is acquainted with the contents of said petition, and that the facts and matters set forth in said petition are true to the best of his knowledge and belief.

J. ALTHEUS JOHNSON.

Sworn to and subscribed before me this 21 day of May, A. D. 1891.
[SEAL.] JOHN RANDOLPH,
Asst. Clk. Ct. of C.

15 *Statement showing the action of the accounting officers of the Treasury.*

Thomas Smith in account with the United States. Official emoluments, 1888.

DEBTOR:

To earnings as follows:		
Docket fees, &c.	$3,350.00	
Salary	250.00	
Per diems	1,720.00	
Mileage	424.80	
Special compensation	425.00	
		$6,169.80

CREDITOR:

By maximum compensation	$3,500.00	
Clerk hire and office expenses	672.92	
Per diems unpaid (withheld as in excess of maximum compensation)	1,572.68	
Mileage unpaid (withheld as in excess of maximum compensation)	424.80	
		$6,169.80

16 *Stipulation.*—Filed May 19, 1891.

In the court of claims, Dec. term, 1890.

THOMAS SMITH
v.
THE UNITED STATES, } No. 16428.

THOMAS SMITH
v.
THE UNITED STATES, } No. 16684.

Stipulation.

It is hereby agreed that the above named cases, Nos. 16428 and 16684 may be consolidated and that one findings of fact and law may be filed and one judgment may be rendered therein.

JOHN B. COTTON,
Assistant Attorney-General.
EPPA HUNTON,
Council for Claimant.
J. ALTHEUS JOHNSON,
Attorney for Claimant.

Allowed.

W. A. R., *Ch. J.*

17 *Traverse.*—Filed May 21, 1891.

In the Court of Claims of the United States. December term, A. D. 1890.

THOMAS SMITH,
vs.
THE UNITED STATES. } Nos. 16684 & 16428, consolidated.

And now comes the Attorney-General, on behalf of the United States, and answering the amended petitions of the claimant herein, denies each and every allegation therein contained; and asks judgment that the said petitions be dismissed.

And as to so much of the said petitions as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

18 *Findings of fact.*—Filed June 1, 1891.

This case having been heard before the court of claims, the court, upon the evidence and after considering the briefs and arguments of counsel on both sides, makes the following findings of fact:

I.

The claimant was the attorney for the United States in the Territory of New Mexico during the calendar years 1886, 1887, and 1888.

II.

1. His accounts for the services performed by him during that time as said attorney, claiming salary and other compensation as due to him from the United States to the amount of $19,230.80, and as payable out of the money of the United States, were duly rendered with the vouchers and items thereof to the proper district court sitting as a court with United States circuit or district court jurisdiction in said Territory. (Rev. Stat., 1910.) Said accounts were then duly proven in open court, and thereupon the said court caused to be entered of record an order approving said accounts in that amount as just and according to law. (Act of 1875, February 22, ch. 95, 18 Stat., 333. and supplement to Rev. Stat., p. 65.)

2. Said accounts were thereafter presented to and examined by the proper accounting officers of the Treasury Department and certified as correct for the years and amounts as follows:

For the calendar year—	
1886	$5,614.00
1887	6,822.00
1888	6,169.80
	18,605.80

3. Of the above amounts the following payments have been made to the claimant:

Compensation as maximum rate for the years—	
1886	$3,500.00
1887	3,500.00
1888	3,500.00
Office expenses and clerk hire for the years—	
1886	974.10
1887	2,119.32
1888	672.92
	14,266.34
Balance not paid	4,339.36

19 4. The sums allowed to the claimant for clerk hire and office expenses, as named in the preceding paragraph, did not include the expenses of travel, which claimant incurred and paid while in the discharge of official duty, nor of board and lodging while attending on sessions of the court. These expenses in the year 1888 were incurred and paid by claimant as follows:

Travel	$100.00
Board and lodging	291.25

It does not appear what such expenses amounted to during the years 1886 and 1887.

III.

1. Among the charges in the accounts mentioned in paragraph one of the second finding, which were included in the order of approval also therein mentioned the following items appear:

The United States to Thomas Smith, United States attorney for the Territory of New Mexico, for services performed by him in an unofficial capacity under the direction of the Attorney-General of the United States, Dr.

In what case.	Amount.
Case v. Zuñi Indians	$500.00
Stoneroad v. Stoneroad	100.00
Case v. Lieut. H. A. Benson	560.00
Pueblo de Acoma v. Sanit et al	25.00
Pueblo de Acoma v. Sanit et al	75.00
United States v. Cañon del Agua Co	500.00
San Marcial Land Co. v. Armijo	150.00
	1,910.00

2. The claimant had been directed by the Attorney-General to act as counsel for the United States in the above-mentioned cases, except in the case of Stoneroad v. Stoneroad, where the appearance was by direction of the court; and although the services required were regarded by both parties as either not pertaining to the office of the attorney for the United States or as not being provided for by the claimant's salary or the statutory fee bill, no agreement was entered into as to the amount of compensation to be paid for the services and no certificate of the Attorney-General was made that the same could not be performed by the Attorney-General, or the Solicitor-General, or the officers of the Department of Justice, or by the district attorney.

3. When the items above mentioned were presented to the Attorney-General he approved them in the amounts following:

Case v. Zuñi Indians for	$300
Case v. Lieut. H. A. Benson for	360
Pueblo de Acoma v. Sanit et al. for	25
Pueblo de Acoma v. Sanit et al. for	75
United States v. Cañon del Agua Co. for	450
San Marcial Land Co. v. Armijo	100
	1,310

20 4. The Attorney-General disallowed the balance of $600 as being in excess of just compensation for the services.

5. The accounting officers of the Treasury Department allowed the amount approved by the Attorney-General, and also disallowed said balance, except as to the charge for services in the case of Stoneroad v. Stoneroad, for which service they allowed $5, under the fee bill, and the disallowance stands at $595.

6. Of the amount so allowed by the accounting officers, to wit, $1,315, the sum of $1,090 is included in the compensation paid to the claimant as set forth in the second finding, and the difference, to wit, $225, has not

been paid. The difference is made up as follows, of the amount approved by the Attorney-General in—

United States v. Cañon del Agua Co	$200.00
Pueblo de Acoma v. Sanit et al	25.00

(7) In The United States v Cañon del Agua the suit was brought to cancel a survey made on a Mexican land grant alleged to be fraudulent, and the proceedings were instituted and carried on in the district court of New Mexico exercising the jurisdiction of a district or circuit court of the United States (R. S., § 1910).

(8) In the other cases mentioned in paragraph 1 of finding III, the suits were brought and carried on in the same court sitting as a district court of the Territory; and the interest or concern of the United States in these suits does not appear, further than that the cases of the Pueblo de Acoma v. Sanit et al. were instituted to protect Indians in respect to an alleged lease of their lands.

(9) In none of these cases in which claimant charged special compensation was any account for services presented under the regular statutory fee bill for district attorneys; and it was proved that the services he performed in said cases were reasonably worth $1,910.

IV.

(1) The accounting officers of the Treasury Department have refused to certify for payment to the claimant the unpaid balance, $4,339.46, set forth in the last line of paragraph 3, finding II, also the disallowance of $595, mentioned in paragraph 5 of finding III, on the grounds that he had been paid for the calendar years 1886, 1887, and 1888 the maximum compensation of $3,500 per annum prescribed by the act of April 7, 1882, ch. 436 (22 Stat. L., 344) (23, 24) for the attorney of the United States in New Mexico; and that said balance consists of fees or emoluments of office within the meaning of sections 833 and 835 (20, 22) of the Revised Statutes; and on the further grounds, in respect to the said item of $595, that it had been disallowed by the Attorney-General as being in excess of just compensation.

(2) The last-mentioned item is composed of the following disallowances by the Attorney-General and the accounting officers of the Treasury Department for claimant's services in—

Case v. Zuñi Indians	$200.00
Stoneroad v. Stoneroad	95.00
Case v. Lieut. H. A. Benson	200.00
United States v. Cañon del Agua Co	50.00
San Marcial Land Co. v. Armijo	50.00
As above	595.00

21 The claimant has been paid $1,090 for his services in the seven cases as set forth in paragraph 6 of finding III.

(3) The unpaid balance of $4,339.46, mentioned in the first paragraph of this finding and in paragraph 3 of the second finding, is composed of the following items, which belong to the calendar years below mentioned:

(a) Year 1886.	Cañon del Agua case	$100.00	
	Mileage	474.00	
	Of per diem compensation	565.90	
	Total for 1886		$1,139.90

(b) Year 1887.	Cañon del Agua case	$100.00	
	Pueblo de Acoma case	25.00	
	Mileage	372.00	
	Of per diem compensation	705.68	
	Total for 1887		$1,202.68
(c) Year 1888.	Mileage	424.80	
	Of per diem compensation	1,572.08	
	Total for 1888		1,996.88
			4,339.46

V.

The uncontroverted items of each year amounted to more than the maximum amount of compensation allowed by law, as set forth in paragraphs 2 and 3 of the second finding.

CONCLUSION OF LAW.

Upon the foregoing finding of facts, the court decides as a conclusion of law that the claimant is entitled to recover the sum of $1,270.80, and no more.

22 *Opinion.*—Filed June 1, 1891.

*Opinion.**

RICHARDSON, Ch. J., delivered the opinion of the court:

The claimant, the district attorney of the United States for New Mexico, brings this action to recover certain fees allowed by the accounting officers in their adjustment of his accounts, and which they refused to certify for payment on the ground that the same should be included among the "fees and emoluments of his office," which he is not allowed to retain beyond the maximum of $3,500 a year, and on other grounds. (R. S., § 883 (20), 835 (22), act of 1882, Aug. 7, chap.. 436, 22 Stat. L., 344 (24).)

There are three items, all in excess of the maximum (24).

The first is mileage amounting to $1,270.80. In our opinion this item does not come within the meaning of the words "fees and emoluments" (20). Mileage is defined to be "an allowance for traveling expenses at a certain rate per mile." (Webster.) It is a commutation or substitute for expenses estimated to be necessary for travel, and is fixed by law at 10 cents a mile (12), which ordinarily or on the average, it is supposed,
23 will cover the actual amount required. It relieves public officers from the trouble of keeping itemized accounts of small disbursements and avoids controversies between them and the accounting officers upon insignificant matters.

It is a reimbursement at a fixed rate, alike to the Government in all cases. Actual expenses may not and generally are not alike to all officers. Their expenses of travel vary according to the distance and the time occu-

* NOTE.—The references in parentheses in this opinion and findings are to sections of the existing statutes printed at the end of the opinion.

pied in the business for which the journey is made, as well as according to the difference in taste and the economical or luxurious habits of the persons. In traveling by rail one officer may go in an ordinary car, while another may take a Pullman, with a whole section for his sleeping apartment. In passing through cities one may go into the street car, while another may take a carriage. The differences of expense in such instances and many others of like character, trifling in themselves, may rise in the aggregate to an amount against which the accounting officers could raise objections, to the great annoyance of the officers.

The commutation for such expenses can no more be regarded as fees and emoluments than would the items of actual expenditures if required to be included in the emolument return, which latter, we apprehend, nobody would claim to be either fees or emoluments.

The second item is $2,843.66—for each day of necessary attendance in a court of the United States on the business of the United States when the court was held at the place of his abode, and for his attendance when the court was held elsewhere, $5 per day; and for examinations before a judge or commissioner of persons charged with crime, $5 a day for the time necessarily employed, as allowed by the Revised Statutes, § 824 (12).

The claimant urges that this is to reimburse him for his personal expenses, and should not be included as part of the emoluments of his office which go to make up his maximum. But we do not so regard it. He attends court and such examinations on the business of the Government, and this is his compensation. As this allowance applies both to attendance in courts held at his place of abode, whereby he is subjected to no additional expenses, as well as elsewhere, and as the fee is the same in both cases, it is not supposed that Congress contemplated reimbursement of expenses by this fee.

The third item presents more difficulties. It is a claim of $595, balance unpaid for services performed in certain cases in the Territorial courts of the claimant's district, in one of which the United States was a party, and in all but one by direction of the Attorney-General, and in that one by direction of the court itself, and in one case in the United States district court for the Territory. In all of the cases the Government was supposed to be in some way interested. Conceding that these services were not within the official duties of the district attorney, which it might be difficult to determine if we were required to pass upon that point; we are brought to the consideration of the questions, whether or not the Attorney-General had a right by any general law to employ the claimant at all, or, employing him without an agreed compensation, what should be the measure of pay for the service performed?

Under what statute was he employed by the Attorney-General? Certainly not under Revised Statutes, § 363 (2), which authorizes the Attorney-General to employ and retain such attorneys and counselors at
24 law as he may think necessary to assist the district attorneys in the discharge of their duties, since the cases occurred in his own district and he could not be employed to assist himself; nor was he retained under § 366 (4), since he received from the head of the Department of Justice no commission as a special assistant to the Attorney-General or to some of the district attorneys, as therein required; nor under § 367 (5), because he was not sent out of his State or district, as may be contem-

plated by that section, and was not an officer of the Department of Justice. This latter is apparent from § 365 (3), which mades a distinction between district attorneys and officers of the Department of Justice.

But, conceding further that there was authority by general law for his employment by direction of the Attorney-General, what is the measure of his compensation?

Revised Statutes, section 1765 (18), provides that no officer in any branch of the public service whose salary, pay, or emoluments are fixed by law or regulations shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

Section 365 (3) prohibits the payment of compensation unless the Attorney-General certifies that the service could not be performed by the Attorney-General, Solicitor-General, or the officers of the Department of Justice, or by the district attorneys. That certificate the Attorney-General did not make, and could not make, because the services were in fact performed by a district attorney, and that, too, within his own district.

If he is entitled to this pay at all, it is under §§ 823, 824 (11, 12), which prescribe all the fees that can be allowed to district attorneys, and § 299 (26), which provides that for unofficial services district attorneys shall be allowed payment "assimilating the fees, as near as may be, to those provided by law for similar services in cases in which the United States is a party."

The items of service in this case are not proved, and we have no means of determining what the assimilated fees would be, but they would be small under any circumstances in comparison with the charges of the district attorney in his account, and were probably not considered of enough consequence to be proved. If he were allowed assimilated fees in every case charged for, the amount, as we make it, could not exceed $280, and probably would be much less.

Mr. Comptroller Lawrence had this same question before him. He passed accounts approved by the Attorney-General for charges similar to those of the claimant, and allowed them "by force of the proviso in the act of 1874, June 20, chap. 328, sec. 3" (19). That act prohibits any civil officer from receiving any compensation beyond his salary or compensation allowed by law, with this proviso, "that this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries and fees." He held that there was no previous law providing for such employment, and that payment for such services was positively prohibited by R. S., § 1765 (18), and other sections. He found, however, that it had been the practice or custom of the Attorney-General to approve accounts for like charges, for the accounting officer to pass them, and for the Treasury to pay the same. He regarded the proviso in the act of 1874 as recognizing and legalizing that practice or custom.

We do not so interpret the meaning of the proviso. There are extra duties for which district attorneys are allowed by law to be paid. (R. S., §§ 825, 827, 4664 (13, 15, 16), and perhaps others.) These laws may

have been those referred to in this proviso, which is only a saving clause to that which precedes it, prohibiting extra compensation to all civil officers, with an exception by the proviso in favor of district attorneys for employment and payment "as now allowed by law."

If there were an existing practice or custom to employ and pay district attorneys in cases not then allowed by law, this proviso clearly implies that it is not excepted from the preceding general prohibition.

But if Congress acted upon a mistaken understanding of the existing law, we can not see how the proviso made a new law. It was held by the Supreme Court, in Postmaster-General v. Early (12 Wheaton, 148), that "a mistaken opinion of the legislature concerning the law does not make the law," unless "the mistake is manifest from words competent to make the law for the future."

We find no words in this proviso competent to make the law for the future, as held by the Comptroller.

The items of this branch of the accounts were not allowed as counsel fees by the judge before whom the cases were tried, as provided by R. S., §§ 823, 824 (11, 12), and so were not judicially determined. The whole account, including the charge for appearing in a case in the Territorial court by direction of the judge, was examined and certified by the district judge, as provided by the act of 1875, February 22, ch. 95, before presentation to the Treasury, but that was not an adjudication conclusive upon the parties, except as to the fact that the services were performed, and did not establish the right to payment without revision on the merits. (Waters's Case, 21 C. Cls. R., 30; affirmed on appeal, 133 U. S. R., 208; Jones's Case, 134 U. S., 483.)

As to the charge for service in a case in the Territorial court performed by direction of the court itself, we know of no law authorizing the court thus to employ the claimant and no law for payment for services rendered under such circumstances.

These charges, amounting to $1,910, were approved in part, including $100 charged for services thus performed by direction of the Territorial court, and disapproved in part as excessive by a former Attorney-General, and as so approved were allowed by the accounting officers and paid to the extent stated in the findings of fact.

The first authority given by statute to pay for services not covered by salary or fees, or extra compensation above referred to, was contained in the legislative, executive, and judicial appropriation act for the fiscal year ending June 30, 1889, repeated in each subsequent year since, in these words: "For payment of district attorneys, the same being for payment of such special compensation as may be fixed by the Attorney-General for services not covered by the salary or fees, $5,000." (25 Stat. L., 542.)

26 The claimant is entitled to the benefit of this provision for the services performed during the last half of the year 1888, and he has had that by receiving for his compensation all that was fixed for that service by the approval of the Attorney-General. The amount approved by the Attorney-General and not allowed by the accounting officers was for services prior to that time.

As to the services for the two and a half previous years, although approved by a former Attorney-General, the Department of Justice now, with an able brief by an industrious assistant, controverts the claimant's right to the compensation claimed.

We agree with the Department of Justice in its present contention and decide against the claimant. No counter claim nor set off has been filed by the defendants.

Upon these views of the law the claimant is entitled to recover the amount of his mileage, $1,270.80, and no more, and judgment will be entered in his favor for that sum.

We append copies of sections of the Revised Statutes and subsequent acts, the construction of which is more or less involved in the case or throw light upon the subjects discussed, arranged for convenience of reference and comparison, not in numerical order of sections, nor chronological order of dates, but under different headings into which they are classified according to the subject-matter, as far as practicable. They are referred to in the findings and opinion for the same reason, not only by sections, etc., but by numbers in parentheses.

EMPLOYMENT.

(1) SEC. 359. Except when the Attorney-General in particular cases otherwise directs, the Attorney-General and Solicitor-General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney-General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor-General or any officer of the Department of Justice to do so.

(2) SEC. 363. The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.

(3) SEC. 365. No compensation shall hereafter be allowed to any person, besides the respective district attorneys and assistant district attorneys, for services as an attorney or counselor to the United States, or to any branch or Department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney-General that such services were actually rendered, and that the same could not be performed by the Attorney-General, or Solicitor-General, or the officers of the Department of Justice, or by the district attorneys.

(4) SEC. 366. Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department, as a special assistant to the Attorney-General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law.

(5) SEC. 367. The Solicitor-General, or any officer of the Department of Justice, may be sent by the Attorney-General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.

(6) SEC. 771. It shall be the duty of every district attorney to prosecute in his district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors or other officers of the revenue for any act done by them, or for the recovery of any money exacted by or paid to such officers and by them paid into the Treasury.

(7) SEC. 380. All suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the Solicitor of the Treasury.

(8) SEC. 838. It shall be the duty of every district attorney to whom any collector of customs or of internal revenue shall report, according to law, any case in which any fine, penalty, or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties, and forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings can not probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue, for their direction.

And for the expenses incurred and services rendered in all such cases the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of.

Provided, That the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law by reason of such allowance and payment.

(9) SEC. 3085. District attorneys, upon receiving the report of a collector, shall cause suit and prosecution to be commenced and prosecuted without delay for the fines and personal penalties by law in such case provided, unless, upon inquiry and examination, they shall decide that a conviction can not probably be attained, or that the ends of public justice do not require that a suit or prosecution should be instituted, in which case they shall report the facts to the Secretary of the Treasury for his direction.

For expenses incurred and services rendered in prosecutions for such fines and personal penalties they shall receive such allowance as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such prosecution was had.

(10) SEC. 355. * * * The district attorneys of the United States, upon the application of the Attorney-General, shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts.

COMPENSATION.

(11) SEC. 823. The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to * * district attorneys, * * except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

(12) SEC. 824. On a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: Provided, That in cases of admiralty and maritime jurisdiction, where the libelant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars.

In cases at law, when judgment is rendered without a jury, ten dollars.

In cases at law, when the cause is discontinued, five dollars.

For scire facias, and other proceedings on recognizances, five dollars.

For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents.

For services rendered in cases removed from a district to a circuit court by writ of error or appeal, five dollars.

For examination by a district attorney, before a judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed.

28 For each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term.

For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning.

When an indictment for crime is tried before a jury and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars.

(13) SEC. 825. There shall be taxed and paid to every district attorney two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding.

(14) SEC. 826. No fee shall accrue to any district attorney on any bond left with him for collection, or in a suit commenced on any bond for the renewal of which provision is made by law, unless the party neglects to apply for such renewal for more than twenty days after the maturity of the bond.

(15) SEC. 827. When a district attorney appears by direction of the Secretary or Solicitor of the Treasury, on behalf of any officer of the revenue in any suit against such officer, for any act done by him, or for the recovery of any money received by him and paid into the Treasury in the

performance of his official duty, he shall receive such compensation as may be certified to be proper by the court in which the suit is brought, and approved by the Secretary of the Treasury.

(16) SEC. 4646. The district attorney and prize commissioners, except the naval officer, shall be allowed a just and suitable compensation for their respective services in each prize cause, to be adjusted and determined by the courts, and to be paid as costs in the cause.

(17) SEC. 4647. Each district attorney * * * shall render to the Attorney-General an annual account of all sums he shall have received for all services in prize causes within the previous year; and the district attorney shall be allowed to retain therefrom a sum not exceeding three thousand dollars a year, in addition to the maximum compensation allowed to be retained by him; * * * or in addition to any salary he may receive in lieu of such maximum compensation; * * * and any excess over those respective amounts shall be paid by the officer receiving the same into the Treasury of the United States, and shall be credited to the fund for paying naval pensions.

(18) SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

(19) Act of 1874, June 20, ch. 328 (18 Stat. L., 101):

SEC. 3. That no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law:

Provided, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees.

ACCOUNTS.

(20) SEC. 833. Every district attorney shall, on the first days of January and July in each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act Said returns shall be verified by the oath of the officer making them.

(21) SEC. 834. The preceding section shall not apply to the fees and compensation allowed to district attorneys by sections eight hundred and twenty-five and eight hundred and twenty-seven.

All other fees, charges, and emoluments to which a district attorney * * * may be entitled, by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in
29 which the United States will be bound by the judgment rendered

therein, whether prescribed by statute or allowed by a court, or any judge thereof, shall be included in the semiannual return required of said officers by the preceding section.

(22) SEC. 835. No district attorney shall be allowed by the Attorney-General to retain of the fees and emoluments of his office, which he is required to include in his semiannual return, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury Department, a sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year.

(23) SEC. 837. The district attorneys and marshals for the districts of Oregon and Nevada shall be entitled to receive, for the like services, double the fees hereinbefore provided, but neither of them shall be allowed to retain of such fees any sum exceeding the aggregate compensation of such officer as hereinbefore provided.

(24) Act of 1882, August 7, chapter 436 (22 Stat. L., 344).

Section eight hundred and thirty-seven of the Revised Statutes of the United States is extended to the Territories of New Mexico and Arizona, and shall apply to the fees of all officers in such Territories. But the district attorney shall not, by fees and salaries together, receive more than three thousand five hundred dollars per year; and all fees or moneys received by him above said amount shall be paid into the Treasury of the United States.

(25) SEC. 846. The account' of district attorneys, clerks, marshals, and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts.

(26) SEC. 299. All accounts of the United States district attorneys for services rendered in cases instituted in the courts of the United States, or of any State, when the United States is interested, but is not a party of record, or in cases instituted against the officers of the United States, or their deputies, or duly appointed agents, for acts committed or omitted or suffered by them in the lawful discharge of their duties, shall be audited and allowed as in other cases, assimilating the fees, as near as may be, to those provided by law for similar services in cases in which the United States is a party.

30 *Judgment of the court.*

THOMAS SMITH
vs.
THE UNITED STATES. } Nos. 16428 and 16684.

At a Court of Claims held in the city of Washington, 8th of June, A. D. 1891, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said claimant, Thomas Smith, have and recover of and from the United States the sum of twelve hundred and seventy dollars and eighty cents ($1,270.80).

BY THE COURT.

31 *Application for and allowance of appeal.*

THOMAS SMITH
vs.
THE UNITED STATES. } Nos. 16428 and 16684.

From the judgment rendered in the above-entitled cause on the eighth day of June, 1891, in favor of claimant, the defendants, by their Attorney-General, on the 8th day of August, 1891, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Assistant Attorney-General.

Filed and allowed August 8, 1891, in vacation.

WILLIAM A. RICHARDSON,
Chief Justice.

32 In the U. S. Court of Claims.

THOMAS SMITH
vs.
THE UNITED STATES. } Nos. 16684 and 16428.

From so much of the judgment rendered in the above-entitled cause on the eighth day of June, 1891, as is in favor of the defendants, the claimant by his attorneys on this 19th day of August, 1891, makes application for and gives notice of an appeal to the Supreme Court of the United States.

EPPA HUNTON,
J. ALTHEUS JOHNSON,
Attorneys for Claimant.

Filed and allowed in vacation, Aug. 19, 189'.

WILLIAM A. RICHARDSON,
Chief Justice.

33 In the Court of Claims.

THOMAS SMITH
vs.
THE UNITED STATES. } Nos. 16428 and 16684.

I, Archibald Hopkins, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact by the court, and the conclusion of law thereon; of the opinion of the court; of the judgment of the court; of the application of the def'ts and of the claimant for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this fourth day of September, 1891.

[SEAL.]

ARCHIBALD HOPKINS,
Chief Clerk, Court of Claims.

(Indorsement on cover:) No. 289. 14839. The United States, appellant, vs. Thomas Smith. Filed September 14, 1891. No. 345. Case No. 14933. Thomas Smith, appellant, vs. The United States. Filed November 23, 1891. Court of Claims.

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156-348

Office Supreme Court, U. S.
FILED.
APR 8 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

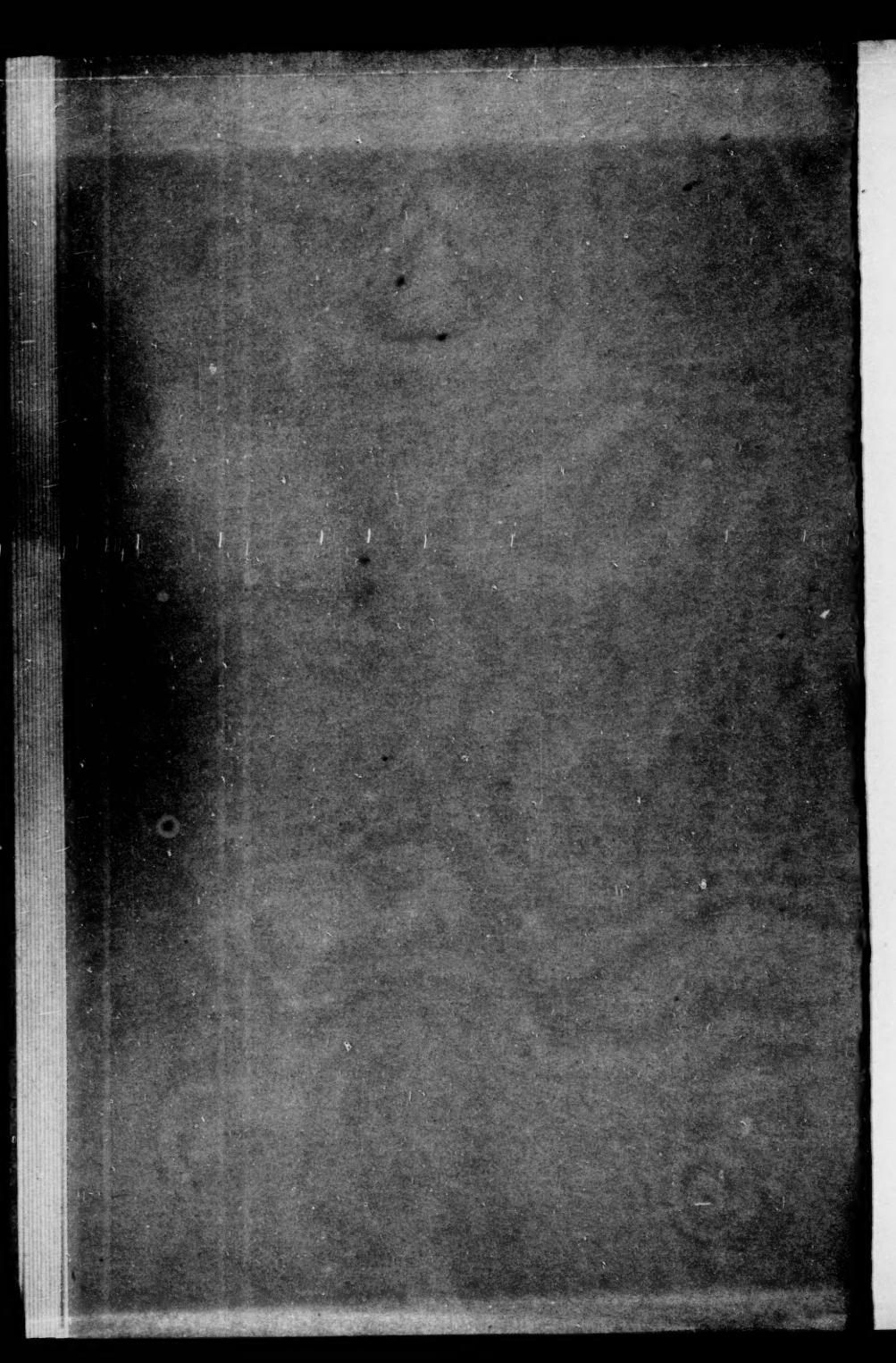
OCTOBER TERM, 1894.

THE UNITED STATES, APPELLANT,
v.
THOMAS SMITH. } No. 289.

THOMAS SMITH, APPELLANT,
v.
THE UNITED STATES. } No. 345.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT IN No. 289.



In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, APPELLANT, v. THOMAS SMITH. } No. 289.

THOMAS SMITH, APPELLANT, v. THE UNITED STATES. } No. 345.

BRIEF FOR APPELLANT IN No. 289.

STATEMENT.

The claimant brought suit against the United States in the court below for certain compensation alleged to be due him from the defendent for services performed as United States attorney in and for the Territory of New Mexico, during his term of office, from January 1, 1886, to December 31, 1888.

He claimed a balance of $4,339.46 as due and unpaid on accounts rendered to the accounting officer of the Treasury Department which had been duly approved as provided in the act of February 22, 1875 (18 Stat. L., 333).

All of this amount resulted from the withholding by the Treasury officials of the excess of the emoluments of 1886, 1887, and 1888, above the maximum annual compensation, $3,500, allowed by law. (Ch. 436 of 1882, 22 Stat. L., 344.)

Claimant contended that three classes of charges were not properly emoluments or fees, and could be held by him in excess of the legal maximum. These classes were:

First. Travel fees, at twenty cents per mile (§ 824, R. S.), aggregating $1,270.80.

Second. Per diem fees for attendance on court, at ten dollars per day, aggregating $2,843.66.

Third. A portion of $1,310 special allowances in unusual cases, the portion disallowed in excess of maximum being $225.

Of these three classes only the first was allowed to claimant by the Court of Claims, and therefore on the defendant's appeal the second and third will be dismissed from consideration.

This first item appears in the accounts and in the statute to be claimed "for traveling from the place of his abode to the place of holding any court of the United States in his district, twenty cents a mile for going and twenty cents a mile for returning," and is distributed among the three years, $474 in 1886, $372 in 1887, and $424.80 in 1888; the rate being twenty cents per mile by virtue of the act of August 7, 1882 (22 Stat. L., 344), and section 837, Revised Statutes, which provides that "The district attorneys and marshals for [certain Territories] shall be entitled to receive, for the like services, double the fees hereinbefore provided, etc."

Claimant disbursed $100 for actual expenses of travel and $291.25 subsistence expenses while attending court during the year 1888. As to other years the amounts of such disbursements were not shown.

The court below rendered judgments for the claimant in the sum of $1,270.80 for the travel items, and in favor of the defendant for the balance of the claim.

ASSIGNMENT OF ERRORS, CASE NO. 289.

(1) The court below erred in its conclusion of law on the facts found that the claimant is entitled to recover the sum of $1,270.80 fees for said travel.

(2) The court below erred in ordering, adjudging, and decreeing that the claimant should have and recover of and from the United States the sum of $1,270.80.

ARGUMENT.

The questions to be determined on this appeal are these:

(1) Is the travel fee allowed by section 824, paragraph 9, of the Revised Statutes, to a district attorney of the United States a "fee" or an "emolument" of his office, within the meaning of section 833?

(2) In making the emolument returns required by section 833, on the form prescribed by the Attorney-General, should the district attorney include in the items "Fees and emoluments earned from the United States," the fee for travel allowed by section 824? [For the form of this return, see Register of the Department of Justice for year 1884, p. 194.]

(3) In making these returns may the district attorney include in "Allowances to be deducted from the gross earn-

ings and retained by the attorney," the travel fee earned during the periods covered by the returns; and, if not, may he there include the actual cost of transportation for the distances traveled upon which his mileage accrued?

I.

The question whether or not the money earned by a district attorney in traveling is in the nature of fees and compensation, or merely in the nature of reimbursement of an expenditure, seems not difficult of answer. The only statute under which it can be earned is chapter 16, Title XIII, of the Revised Statutes, headed "FEES." The first section of that chapter, section 823, provides:

> The following and no other *compensation* shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, etc.

Then follows heading "FEES OF ATTORNEYS, SOLICITORS, AND PROCTORS." Ninth item:

> For traveling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning.

Then follows, after a designation of various other fees, the further heading of "CLERKS' FEES AND MARSHALS' FEES," with various sections regulating methods of procedure, presentation of bills, etc., until section 833 is reached, with the following language:

> Every district attorney * * * shall, on the first days of January and July, in each year, or within

thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year.

Section 834 provides:

The preceding section shall not apply to the fees and compensation allowed to district attorneys by section eight hundred and twenty-five and eight hundred and twenty-seven. (Revenue cases.) All other fees, charges, and emoluments to which a district attorney or a marshal may be entitled by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court or any judge thereof, shall be included in the semiannual return required of said officers by the preceding section.

Then section 835 provides:

No district attorney shall be allowed by the Attorney-General to retain of the fees and emoluments of his office which he is required to include in his semiannual return, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk hire, * * * a sum exceeding six thousand dollars a year.

The reading of the statutes §§ 824 and 825 seems to leave no room for doubt that this allowance "for traveling" is a fee. It is one item of a schedule of six under heading

"Fees." It is in exactly the same phraseology used to confer the fees for taking a deposition or making an examination before a commissioner, and the only effective words of grant whereby the district attorney becomes entitled to receive it describe it as "compensation."

The only attempt made by the court below to justify a different conclusion consists in a disquisition upon the general definition of "mileage" quite immaterial to the subject in hand, for if "mileage" is what the Court of Claims defines it, then the fee allowed district attorneys and marshals for traveling (not for traveling expenses) is not mileage. It is significant that this allowance is never called mileage. It bears no relation to amount of expense, for it is allowed to the marshal either single or double according only to whether he has one or two writs in his pocket, a circumstance which changes not at all the expense he suffers.

On the other hand, when the statutes propose to provide for mileage in the sense in which the Court of Claims uses it, very different language is adopted. For example, mileage, in the sense of reimbursement of expense, is conferred upon naval officers by § 1566 by use of the expression "An allowance of ten cents a mile may be made naval officers, etc., for traveling expenses," not by saying "they shall receive as sole compensation a fee for traveling," etc., the language of § 824 and § 825 in substance.

Even the expression "mileage" is by no means limited to the signification adopted by the Court of Claims.

Bouvier's Law Dictionary defines it—

> "A compensation allowed by law to officers for their trouble and expense in traveling on public business."
>
> Allowances of this description to the officers of courts are commonly called the traveling fees of such officers. * * * Attorney-General Brewster, 18 Op., 123.

The traveling allowances of the various fee bills for officers of the United States courts are always described as fees and emoluments of office.

Congress in prescribing the compensation of officers of the courts has always regarded the allowances for travel granted to district attorneys as "fees" or "official compensation," and not merely as "an allowance for traveling expenses at a certain rate per mile" (Webster); or (as defined by the court below) "a commutation or substitute for expenses estimated to be necessary for travel."

We find that the legislation on this subject commenced with the judiciary act of 1789, chapter 20 (1 Stat. L., 73).

Section 35 of that act says the district attorney "shall receive as a compensation for his services such fees as shall be taxed therefor in the respective courts before which the suits or prosecutions shall be."

This compensation was regarded as taxable fees, and out of these the attorney paid all the expenses he incurred in the suits or prosecutions for which the fees were taxed.

Then follows the "act providing *compensations* for the officers of the judicial courts of the United States," * * * approved March 3, 1791. (1 Stat. L., 216.)

Section 1 allowed fees for travel to district attorneys and clerks of court as an addition to the fees previously authorized, thus:

> To the attorney of the United States for the district for his expenses *and time* in traveling from the place of his abode to any court of the United States on which his attendance shall be requisite, at the rate of ten cents per mile going, and the same allowance for returning.

This statute gave the like fees per mile to the clerk of the court, but not to the marshal. It gave in addition a fee of of five dollars per day to the clerk and marshal for attending court, and fifty cents a day to jurors and witnesses for attending in court, but no per diem was allowed to the attorney. It gave the marshal five cents a mile for his necessary travel in serving process and five cents a mile to jurors and witnesses for their travel, and the difference in mileage rates may well have been in consideration of the differing value of the time of the different officers.

At that time Congress regarded these allowances as sufficient "compensation" for the "expenses and time" of the officers, jurors, and witnesses while they were traveling from the places of their abode to attend court, while they were attending in court, and while returning therefrom to their respective places of abode.

In the "Act for regulating processes in the courts of the United States, and providing compensation for the officers of the said courts, and for jurors and witnesses," approved May 8, 1792, chapter 36, Congress regarded the mileage allowed to these officers and persons as "fees and compen-

sation" for their "expenses and time" while going to attend court and returning therefrom.

The fact that mileage was allowed by this act as "fees and compensation" is conclusive that it was intended to be *compensation* not only for *expenses of travel*, but also as *a fee* for the *time devoted to the service of the United States.* For example, the marshal's mileage:

For his *travel out* in serving any writ the *fee* and *compensation* were fixed at five cents a mile.

For travel *from* his place of abode to attend court, "ten cents per mile for his expenses and time."

The clerks' and attorneys' mileage: At the rate of ten cents per mile for their expenses and time in traveling from the place of abode to either of the said courts.

The mileage of jurors and witnesses: At the rate of five cents a mile for traveling from their respective places of abode to the place where the court was held and the like allowance for returning.

In the act of February 28, 1799 (1 Stat. L., 624), chapter 19, section 4, Congress again allowed mileage to these officers as compensation for official services, thus:

> That the compensation to the attorneys of the respective districts of the United States shall be as follows: * * * For traveling from the place of his abode to such court [district or circuit] ten cents per mile; * * *.

The act of February 26, 1853, now codified in the Revised Statutes (Title XIII, chap. 16), regards mileage as full compensation for official services, and directs it to be taxed and allowed as such. Where the service of court

officers is so compensated in this act, different rates are prescribed according to the nature of the duty performed; or example:

When the marshal travels to serve any process, he is allowed six cents a mile "in going only." When he transports a criminal in his district he is allowed ten cents a mile for himself and the prisoner and each necessary guard. When he travels to the place of holding court he is allowed ten cents a mile for going only, but for the like duty a district attorney is allowed ten cents a mile each way. For travel to attend an examination before a commissioner the attorney is allowed ten cents mileage each way, and the marshal is allowed no mileage for the like duty. For travel to attend court the clerk is allowed only five cents a mile each way. Jurors and witnesses are allowed mileage of five cents for their travel each way.

If the mileage of the fee bill had been intended merely as "a commutation or substitute for expenses estimated to be necessary for travel" (as defined by the court below) and not as compensation for official services, we would not find these statutory variations of rates of mileage.

Our contention is further supported by more recent legislation, to wit, the Army appropriation act of June 16, 1874, paragraph 6 (18 Stat. L., 72), which abolished all official mileage, and the act of February 22, 1875 (*Ib.*, 334), which restored it to attorneys, clerks, and marshals, their assistants and deputies.

The prohibition of the former act reads as follows:

> That only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mile-

> age and transportation in excess of the amount actually paid are hereby declared illegal; and no credit shall be allowed to any of the disbursing officers of the United States for payment or allowances in violation of this provision.

The intention there was to prohibit compensation to salaried officers and employés of the United States in excess of their salaries, by restricting them to the reimbursement of actual traveling expenses.

On September 14, 1874, the Secretary of the Treasury asked the opinion of the Attorney-General as to whether the mileage to marshals for each necessary guard while transporting prisoners, as provided by the act of February 26, 1853 (Rev. Stat., 829), had been superseded by the above proviso, and the Attorney-General said in his opinion:

> I see no way of avoiding the conclusion that the comprehensive expression in the Army appropriation act of June 16, 1874, in relation to mileage, applies as well to the mileage heretofore allowed to marshals on account of guards and prisoners transported by them (Rev. Stat., sec. 829) as to any other whatever. The effect of this is to confine marshals to their *actual traveling expenses* allowed in the same section and also in the *proviso*. (14 Op. Att'y Gen., 683.)

As the mileage allowance to marshals and their deputies for travel in the performance of their official duty is the largest item of their compensation, as the salaries of the marshals and district attorneys are merely nominal, and as no salary is provided for clerks of district or circuit courts or their deputies, or for deputy marshals,

Congress, by section 7 of the aforesaid act of February 22, 1875, which is entitled "An act regulating fees and costs, and for other purposes," enacted—

> That the proviso in the sixth paragraph of the act * * * approved June 16, 1874, shall not be construed to apply or to have applied to attorneys, marshals, or clerks of courts of the United States, their assistants or deputies.

This legislation distinctly indicates that Congress has always regarded the "mileage" of these officers as including not only reimbursement of actual traveling expenses, but also compensation for their time and trouble in traveling on public business, according to the legal definition of the word and as entirely distinct from mileage to Army and Navy officers and others drawing salaries by way of compensation.

Where the legislature contemplates only reimbursement of actual expenses of travel, the law says so in distinct terms. Only two instances occur in the fee bill:

First. In section 829, Revised Statutes, which says in the last clause:

> In all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath, to the satisfaction of the court.

Second. In section 850, which says:

> When any clerk or other officer of the United States is sent away from his place of business as a witness for the Government, his necessary expenses, stated in items and sworn to, in going, returning, and

attendance on the court, shall be audited and paid; but no mileage or other compensation, in addition to his salary, shall in any case be allowed.

Duvall v. *United States*, 23 C. Cls. R., 102.

These sections expressly recognize the legal definition of the word "mileage" as including something more than reimbursement of expenses of travel. In section 850 it is regarded as including compensation for a public service. It is regarded throughout the fee bill as including some compensation for the performance of a public service, or a professional service, or a civil duty; hence mileage fees are not allowed to "clerks or other officers of the United States," because their full compensation is by salaries and not by fees. Hence, as in the case provided for in section 829, when for example the travel fee of six cents a mile in going only to serve process of the court is not only insufficient to furnish compensation for the marshal for performing that duty, but falls short of actual expenses, he may elect to waive his fee and take, in lieu thereof, his actual traveling expenses.

Again, in order to reach the amount of $1,270.80 awarded by the court, the claimant has made his computation at twenty cents per mile—double the rate allowed for traveling by § 823. The only statutory authority for such double rate, existing or contended for, is the act of August 7, 1882, (22 Stat. L., 344), extending to New Mexico and Arizona section 837 of the Revised Statutes, which provides merely that United States attorneys in certain territories shall receive "double the *fees* hereinbefore

provided." If, as claimant contends, the charge for travel in § 823 is not a "fee," then surely it can not be doubled by § 837.

II.

If the compensation for traveling provided in § 824 is a fee, charge, or emolument, as we have argued, no discussion is necessary to show the control of §§ 833 and 834 over it, and that the claimant was bound to include it in the emolument returns on which his maximum compensation was measured.

III.

The claimant contends further that even if the travel fee prescribed by § 824 is a fee, charge, or emolument, and therefore to be entered in his emolument return, he is entitled to credit upon the other side of his account for the same amount as a statutory measure of his expenses of travel; or, if not to that, at least to the actual expenses of travel out of which the fee grows. Section 835 entitled the district attorney to credit, in case his emoluments exceed the maximum, only "the necessary expenses of his office, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury Department." It is therefore clear, without argument, that as the travel fee is not an exact measure of traveling expenses, it can not measure the amount of the district attorney's credit which is for actual expenses.

The question whether or not the claimant is entitled to credit against his maximum emoluments for the actual

expenses incurred in making this travel is more doubtful. By §§ 833 and 835 it is only the "necessary expenses of his office, including necessary clerk hire," to which he is entitled to credit. Many years ago the Attorney-General established blank forms for emolument returns and for the items of credit to which district attorneys might be entitled, which are there classified into six items, namely, "rent of office," "necessary furniture for same," "clerk hire," "stationery," "fuel," "light;" all expenses of his office, using the last word in the sense of the room or place in which he conducts his business. The expenses of travel can not be included in the expression "expenses of his office," because the latter expenses are limited to a place of business. They would be included in such a phrase as "expenses of his official position," but that is not the language of the statute.

In this case the expenses of travel were not presented, as required, in detail to the accounting officers, and were established in court as to only one of the years involved. If it should be decided that they are a proper credit a new trial and further evidence would be necessary to establish the amount.

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In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THOMAS SMITH, APPELLANT,
v.
THE UNITED STATES, APPELLEE. } No. 345.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT.

Not having been favored with appellant's brief, we must assume that the positions in this court will be substantially those taken by claimant in the court below. The presumed errors to be assigned on the part of the claimant are two: First, the claimant will contend that the charge in his accounts for $5 per diem, for attending the United States courts and for conducting examinations before commissioners, is not a fee, but intended by Congress as a reimbursement for some expense, and therefore is not to be included in the emolument return provided for by sections 833 and 834; and will further contend that if the fee provided by the eighth paragraph of section

824 is a fee to be included in the emolument return, that then he is entitled to credit against the sum of an equal amount, on the theory that it is a statutory measure of his expenses incurred in earning such fee; or, if not entitled to that, he is entitled to his actual personal expenses for board and lodging, incurred upon the days for which the fee is claimed.

The second contention will be that claimant is entitled to $820 disallowed out of his charges of $1,910 for services in the cases mentioned in Finding III, on page 10 of the record, of which $595 was disallowed because it had not been approved or allowed by the Attorney-General, and $225 disallowed specifically because in excess of maximum, although allowed and approved as to amount by the Attorney-General.

ARGUMENT.

The first question presented, therefore, is whether the item included by district attorneys since 1842 in their emolument account, and always treated as a fee and emolument by the accounting officers, which is provided by section 824 of the Revised Statutes under the head of "Fees of attorneys * * * for each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term," is a fee, emolument, or charge within the meaning of sections 833 and 834.

The answer seems to follow the statement of the question too obviously and necessarily to justify extended argu-

ment. The statute, as in the case of the fee for travel, discussed in our former brief, gives it to the district attorney expressly as compensation, describes it as a fee, and gives it in the same amount to the district attorney who lives at the place where the court is held as to the district attorney who lives elsewhere, and makes absolutely no distinction, in the form of language used to confer the fee, between this and any of the other services for which compensation is provided in section 824.

The history of the statutes conferring this fee varies slightly from those conferring the fee for travel, the latter having been earlier provided for by act of Congress.

Section 4, chapter 19, of the laws of 1799 (1 Stat. L., p. 625) first confers it under the expression "*compensation* for each day which any such attorney shall necessarily attend upon the business of the United States during the session of any district or circuit court, five dollars."

It is again referred to in chapter 29 of the laws of 1842, section 167 (5 Stat. L., p. 483), wherein, immediately after a provision directing the method of making emolument return, the statute provides that no statute authorizing the payment of a per diem *compensation* for attendance upon the courts shall be so construed as to authorize such payment for attendance upon the court while sitting for the transaction of business under the bankrupt law only.

The next statute is the fee bill of 1853, embodied almost verbatim in the Revised Statutes, wherein the fee is repeatedly referred to as "compensation."

With this uniform course of legislation on the part of Congress, the uniform treatment of the fee as a fee com-

pensating service from time immemorial, it seems unnecessary to attempt to argue upon a contention such as that made in the court below that the courts might arbitrarily draw a line through section 824 and say that certain fees therein provided are fees and certain others are reimbursements of expense, the only support for such contention being the case of *Townsend* v. *United States* (22 C. Cls. R., p. 207), wherein the remarks of the court upon this question are absolutely and entirely *obiter*, the question in that court not being whether a fee for attendance on court or a fee for travel to attend court was a fee or a reimbursement. The claim therein presented being disallowed, the case was one which it was impossible to bring to this court for review, even upon the matters of law actually decided therein.

It is very difficult, in advance of appellant's argument, to see how it could be contended that Congress, in providing for the payment of a fee of $5 for attendance on a court by a district attorney who lives at the same place where the court is held, and on whom no possible additional expense is imposed by reason of his attendance, meant that allowance not as a fee or compensation, but as a reimbursement of an expense. If it is a fee or compensation to one district attorney it is to another, for the statute recognizes no distinction as to the character of the allowance between those who reside at the place of holding court and those who reside elsewhere.

The second contention of the appellant, that even if this be a fee or compensation for service, yet the district attorney should have a right to credit for his expenses

incurred in earning such fee, hardly finds any support in the statute. The only expenses which he is permitted to set off against his emoluments are defined by section 835 as the necessary expenses of his office, including necessary clerk hire, being but a slight modification of the words used in earlier statutes "necessary office expenses, the necessary clerk hire included." The expenses here sought to be credited are room rent and board of the district attorney at a hotel, a class of disbursements for subsistence which, we think, have never been recognized as included within the description expenses of an office, and the allowance of which has always been refused by accounting officers. Congress at least twice since the creation of this fee in 1799—to wit, in 1853, and in the revision of 1874—has confirmed this construction of the law. Claimant was pleased to solicit and accept his office in the light thereof.

II.

The second claim is for $820, unpaid balance of amounts charged for services in sundry cases of unusual character in the courts of his district. One was a suit by the United States to annul certain patents for lands; the others were suits to which the United States was not a party, but interested or concerned. Claimant was directed by the Attorney-General to represent the Government in all of these cases, except one, and in that he was so directed by the court. (Finding III, p. 10.)

In all of these cases claimant, ignoring the fee bill, charged upon *quantum meruit*, his charges being approved by the court and aggregating $1,910, of which $1,315

was approved by the Attorney-General and $595 disapproved. The $1,315 so approved by the Attorney-General was allowed by the accounting officers, charged to the claimant in his emolument account, and $225 thereof withheld as being in excess of his maximum.

The claimant contends that the services in these cases were no part of his official duty, that he is entitled to their reasonable value on quantum meruit, and that they do not enter into his emolument account. The court held that these services entitled claimant to no compensation save the fees taxable in assimilation to section 824, as provided by section 299, the amount of which fees is not ascertained but would be greatly less than the $1,090 already allowed and paid him.

Three propositions are contended for by the Government, each of which is fatal to claimant's recovery on this item:

1. The representing the Government in all suits to which it is a party or in which it is concerned is part of the official duty imposed on the district attorney by law.

2. Performance of any service not part of his official duty prior to 1888, gave no right to compensation from the Government, no one having authority to subject the latter to liability therefor.

3. The maximum personal compensation allowed a district attorney can not be increased by any extra allowances whatever except as expressly authorized by law.

No question at the present time is more pressed upon the accounting officers than that of extra compensation to district attorneys, and none is marked by greater ingenuity

in suggestion of reasons why allowances at other and greater rates than fixed by the fee bill should be made and why such allowances should be extra and additional to the maximum compensation fixed by section 835. A few illustrations of claims actually made will serve to indicate the importance of the question and the threat to the Treasury from each particle of relaxation of the prohibition against extra compensation.

One district attorney contends that in a suit against the United States under the Tucker Act he should be allowed reasonable professional rates of compensation, because the case is important and involved much labor and skill.

Another demands $250 for services in defending a suit in equity in a State court to enjoin public officers from prosecuting certain public work.

Another demands $150 for commencing a suit in United States circuit court in the name of the United States against a debtor to enjoin transfer of real estate pending decision of another case.

Another demands $8,000 for services rendered in a single year in prosecuting condemnation proceedings in the United States circuit court of his district, in name of United States as plaintiff.

Another demands compensation at ordinary professional rates and in excess of his maximum for defending suits in United States courts against the United States for damages to flooded lands; suits being authorized by a special statute. (This claim has just been decided against by the circuit court of appeals, seventh circuit, *Coleman* v. *U. S.*)

Another illustration is that of a claim for professional rates of compensation for services rendered a receiver of a national bank, disposed of adversely in *Gibson* v. *Peters* (150 U. S., 342).

Another claims $2,000 for services in suit in equity in United States circuit court, wherein United States was plaintiff and 132 persons defendants, to enjoin certain unlawful acts.

Many district attorneys demand special compensation for services in cases in the circuit court of appeals. One in a case arising in his district, and argued in the circuit court of appeals held in his district; another in a case coming from another district but tried in circuit court of appeals in the attorney's own district, and a third in a case arising in his own district but tried in circuit court of appeals sitting in another.

Many also demand compensation extra to fee bill and salary, and extra to their maximum allowance, for services in examination of titles to land for public use.

First.

The services set forth in Finding III were official services, and it was the district attorney's official duty to perform them.

(1) The judiciary act of September 24, 1789, section 35 (1 Stat., L., 92; Rev. Stat., 359, 771), makes it the duty of the district attorneys in their respective districts to represent the Government in * * * "all civil actions in which the United States shall be concerned, except before the Supreme Court in the district in which that court shall be holden."

The judiciary act, it will be observed, did not prescribe a fee bill. It left the compensation of the attorneys to be measured by the fee bills of the State or county courts. But the "act to regulate processes in the courts of the United States," approved September 29, 1789, five days after the approval of the former act (1 Stat. L., 93), provided by section 2 that the "rates of fees, except fees to judges in the circuit and district courts, in suits at common law, shall be the same in each State, respectively, as are now allowed in the supreme court of the same;" and in causes of equity and maritime jurisdiction, that the "rates of fees shall be the same as are, or were last, allowed by the States, respectively, in the court exercising supreme jurisdiction in such cases."

This rule was continued and enlarged by later acts (1 Stat. L., 123, 191, 216, 277, 625; 5 Stat. L., 427, 483), until the enactment of the fee bill of the act of February 26, 1853, which has been incorporated into the Revised Statutes.

In order to remove any uncertainty in the construction of fee bill of 1853 as to whether suits to which the United States was not a party, though interested, whether in State or United States courts, fell within the duties of the district and his services therein were therefore to be compensated according to such fee bill, the act of August 16, 1856 (11 Stat., 49), now section 299, providing for assimilated fees, was passed. With reference to that statute Attorney-General Cushing, on February 27, 1857 (8 Op., p. 399), says:

> You referred to me on the 2d of March, 1855, a proposed circular, which involved questions as to the

fees of district attorneys and requested my views thereon.

The question was whether, when a district attorney appears under direction of the Secretary of the Treasury as counsel for a collector of customs in revenue cases, he is to be considered, in relation to the question of his official compensation, as appearing officially or whether unofficially, as on a special retainer? And so of other cases in which the Government might sue or defend as the real party in interest, without the suit being expressly in the name of the United States.

My impression, suggested to you verbally at the time, was that the official duty of a district attorney covers such cases, at least when sued in the courts of the United States.

We concurred, however, in thinking it well to refer the question to Congress, in order that it might be determined by a declaratory law rather than to place the decision on a ruling of the Attorney-General. That having been done by the act of August 16, 1856 (11 Stat. L., 49), it is unnecessary to argue the question upon its original merits.

That statute of 1856, as section 299, and the fee bill of 1853, as section 823, *et seq.*, have been brought into the Revised Statutes.

The duty of the district attorney is, therefore, generally defined as follows:

> SEC. 771. It shall be the duty of every district attorney to prosecute in his district * * * *all civil actions* in which the United States are concerned.

This language is the same used in 1789 and continuously since. Attorney-General Berrien, in 1830, held that it entitled the Government to services of a district attorney in "any case occurring in the courts of his district, whether State or Federal." (2 Op., 319.)

Attorney-General Cushing, in 1857 (8 Op., 399), so held again as to the official duty; and also held that the compensation, by virtue of the act of August 16, 1856 (now section 299), was to be, not *quantum meruit*, but in assimilation to the fee bill of 1853, and that the act of 1856 had removed any uncertainty as to whether such services were official.

Attorney-General Black, in 1858 (9 Op., 146), held that defense of actions against public officers for acts done *virtute officii* was official duty imposed on district attorney by law, and to be compensated only under the fee bill.

Attorney-General Bates in 1863 (10 Op., 489) held that a suit in equity in the name of the United States to enjoin trespass on real estate was clearly within the words "all civil actions in which the United States shall be concerned," and therefore within the official duty of district attorney, and to be compensated only under the fee bill.

Congress in 1873, in enacting the Revised Statutes, adopted the existing provision as to duties of district attorneys, and the fee bill of 1853, as declared by the act of 1856, and thereby adopted the construction given them by the several Attorneys-General above quoted.

There can, therefore, be no further question that a district attorney, in representing the Government in any case in which the United States is *concerned* in any court

in his district, State or Federal, is only performing his official duty, and must find his compensation within his fees and salary.

Stanton v. *United States*, 37 Fed. Rep., 252–257.
Bashaw v. *United States*, 47 Fed. Rep., 40–42.
Hillborn v. *United States*, 27 C. Cls. R., 547–555.
Perry v. *United States*, 28 C. Cls. R., 483.
Cole v. *United States*, 28 Id., 501.
Gibson v. *Peters*, 150 U. S., 348–347.
Coleman v. *United States*, decided about March 25, by circuit court of appeals, seventh circuit.

Second.

If the services in question were not within the official duty of the claimant, the United States has not legally employed him and is under no liability to him.

Prior to 1870, when the Department of Justice was organized, heads of Executive Departments were authorized to employ counsel in legal proceedings and agree on their compensation, and under this authority very frequently employed district attorneys, and not infrequently they were paid, for services within their official duties, amounts not justified by the fee bill, until, in 1839, was enacted the prohibition against extra compensation, now section 1765 (5 Stat. L., 349).

That statute was promptly held to exclude district attorneys from any extra compensation in an opinion by Attorney-General Gilpin in 1840 (3 Op., 515.)

Then came the fee-bill of 1853, with its provision that the specified and no other compensation should be taxed and allowed to district attorneys, and that was fol-

lowed by the act of 1856 making clear the official duty of district attorneys to attend to cases in which the Government was only interested, but not a party whether in State or United States courts, and to accept the fee-bill compensation therefor.

Meanwhile the authority of heads of Departments to employ counsel when they deemed necessary resulted in frequent employment and payment of district attorneys as such counsel in matters not within their duty, and was supported by the clause in fee bill of 1853, authorizing agreed compensation in such cases expressly.

In 1870, in organizing the Department of Justice (ch. 150, Laws of 1870, sec. 17, 16 Stat. L., 164), it was provided:

> SEC. 17. That it shall not be lawful for the Secretary of either of the Executive Departments to employ attorneys or counsel at the expense of the United States, etc.

Under this act of 1870 it was assumed by accounting officers, by virtue of the nonrepeal of that clause of the fee bill which authorized payment of district attorneys "for services of counsel, rendered at the request of the head of a Department, such sum as may be stipulated or agreed upon," that the authority to request of district attorneys extra services as counsel, and pay agreed compensation therefor, continued, but was transferred from the other heads of Departments to the Attorney-General—a very doubtful conclusion.

That provision for payment was dropped, however, in the Revised Statutes, taking effect December, 1873, while

all the restrictive provisions of the act of 1870 were retained, carefully limiting and defining the conditions under which the Attorney-General may make the Government liable for counsel fees.

The law now contemplates that the Attorney-General and the law officers of the Department of Justice, and the district attorneys in their respective districts, shall be the counsel of the United States in all suits, litigations, and proceedings in which the United States are interested or concerned, as well in State and Territorial courts as courts of the United States. (Rev. Stat., § § 189, 359–363, 366, 367, 370, 771.)

No other officers or persons are allowed to conduct or defend suits in Federal or State courts for the Government, because the law officers above mentioned are alone charged with such duties.

Section 365 says:

> No compensation shall hereafter be allowed to any person beside the respective district attorneys and assistant district attorneys for service as an attorney or counselor to the United States, or to any branch or Department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney-General that such services were actually rendered, and that the same could not be performed by the Attorney-General, or Solicitor-General, or the officers of the Department of Justice, or by the district attorneys.

In what cases "specially authorized by law" may other counsel be employed on behalf of the United States?

We answer, only in the cases provided for in sections 363 and 366 of the Revised Statutes.

Section 363 says that—

> The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct.

Section 366 says that—

> Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department, as a special assistant to the Attorney-General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law.

The attorneys and counsel authorized to be *retained* by sections 363 and 366 are to be *employed* only as "*assistant* attorneys" to the district attorneys, or as "*special assistants* to the Attorney-General," as the nature of the case may require; and in each case the stipulated compensation for the services of such assistant attorneys is payable "only on the certificate of the Attorney-General that the services were actually rendered, and that the same could not have been performed by the Attorney-General, or Solicitor-General, or the officers of the Department of Justice, or by the district attorneys.

As a result of these various provisions of law, it seems obvious that if the service performed in the cases in

question were not within claimant's official duty he has shown no employment under the law to entitle him to compensation. The only pretense of employment is a request, in one case by the court in the others by the Attorney-General, that he represent the United States. Neither court nor Attorney-General had any right or authority to request him to appear in cases not within his duty. The request made by either can have no further or greater force than to express the views, in one case of the court in the others of the Attorney-General, that the United States *was concerned* in the cases in question.

The statutes above referred to carefully limit the authority of the Attorney-General to impose liability upon the Government by the employment of attorneys or counsel, and he has no more power to employ the person who happens to be district attorney than to employ any other individual, but is limited to the conditions imposed by the statute. None of those conditions are satisfied in this case. We can not do better on this immediate subject than to quote the language of Chief Justice Richardson in this case:

> Conceding that these services were not within the official duties of the district attorney, which it might be difficult to determine if we were required to pass upon that point, we are brought to the consideration of the questions whether or not the Attorney-General had a right by any general law to employ the claimant at all, or, employing him without an agreed compensation, what should be the measure of pay for the services performed?
>
> Under what statute was he employed by the Attorney-General? Certainly not under Revised Stat-

utes, section 363, which authorizes the Attorney-General to employ and retain such attorneys and counselors at law as he may think necessary to *assist the district attorneys* in the discharge of their duties, since the cases occurred in his own district and he could not be employed to assist himself; nor was he retained under section 366, since he received from the head of the Department of Justice no commission as a special assistant to the Attorney-General or to some of the district attorneys, as therein required; nor under section 367, because he was not sent out of his State or district, as may be contemplated by that section, and was not an officer of the Department of Justice. This latter is apparent from section 365, which makes a distinction between district attorneys and officers of the Department of Justice.

But, conceding further that there was authority by general law for his employment by direction of the Attorney-General, what is the measure of his compensation?

Revised Statutes, section 1765, provides that no officer in any branch of the public service, whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

Section 365 prohibits the payment of compensation unless the Attorney-General certifies that the service could not be performed by the Attorney-General, Solicitor-General, or the officers of the Department of Justice, or by the district attorneys. That certificate the Attorney-General did not make,

and could not make, because the services were in fact performed by a district attorney, and that, too, within his own district.

Mr. Comptroller Lawrence had this same question before him. He passed accounts approved by the Attorney-General for charges similar to those of the claimant, and allowed them "by force of the proviso in the act of 1874, June 20, chapter 328, section 3." That act prohibits any civil officer from receiving any compensation beyond his salary or compensation allowed by law, with this proviso, "that this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys, *as now allowed by law*, for the performance of services not covered by their salaries and fees." He held that there was no previous law providing for such employment, and that payment for such services was positively prohibited by Revised Statutes, section 1765 (18) and other sections. He found, however, that it had been the practice or custom of the Attorney-General to approve accounts for like charges for the accounting officer to pass them and for the Treasury to pay the same. He regarded the proviso in the act of 1874 as recognizing and legalizing that practice or custom.

We do not so interpret the meaning of the proviso. There are extra duties for which district attorneys are allowed by law to be paid. (Rev. Stat., sections 825, 827, 4664, and perhaps others.) These laws may have been those referred to in this proviso, which is only a saving clause to that which precedes it prohibiting extra compensation to all civil officers, with an exception by the proviso in favor of district attorneys for employment and payment "*as now allowed by law.*"

If there were an existing practice or custom to employ and pay district attorneys in cases not then

allowed by law, this proviso clearly implies that it is not excepted from the preceding general prohibition.

But if Congress acted upon a mistaken understanding of the existing law, we can not see how the proviso made a new law. It was held by the Supreme Court, in *Postmaster-General* v. *Early* (12 Wheaton, 148), that "a mistaken opinion of the legislature concerning the law does not make the law," unless "the mistake is manifest from words competent to make the law for the future."

We find no words in this proviso competent to make the law for the future, as held by the Comptroller.

The act of June 20, 1874, referred to by the Chief Justice, which has been much pressed as a legislative recognition of the existence of some laws authorizing the payment of district attorneys for services not covered by fees or salary.

It should be remembered that on June 20, 1874, when said law was enacted, there was still in force and unrepealed the provision of the fee bill of 1853 authorizing payment to district attorneys agreed compensation for services as counsel rendered at the request of the head of any Executive Department, which is urged as a legal justification for the practice of such employment by the Attorney-General. But that provision was repealed by the Revised Statutes passed and approved on June 22, 1874 though when passed relating back to December, 1873.

If there is force to the claim that the continuance of that provision in the fee bill of 1853 legalized employment and payment of district attorneys, then it is true that

at the moment when the act of June 20, 1874, passed there were payments "*allowed by law*" which since June 22, 1874, have not been so allowed by law.

Upon the general question of extra allowances to district attorneys we desire to cite a pamphlet collection of the decisions of the present Comptroller published during the year 1894, in which the various statutes and departmental rulings are excellently set forth.

Third.

Any compensation paid to claimant for his services in the suits mentioned in Finding III would be paid out of the appropriation for judicial expenses, and it must be included in his emolument returns and maximum.

The only compensation which the law allows to be omitted from the emolument returns of a district attorney is the extra compensation prescribed in sections 825, 827, and 4646 of the Revised Statutes. Sections 834 and 4647 expressly provide that such compensation may be omitted from the returns.

The absence of any law authorizing the omission of such compensation as that claimed in the petition from the emolument returns of district attorneys is conclusive that it must be included in them.

We have seen that where the law contemplates the omission from these returns of any compensation received by a district attorney it says so in express terms. It does not in any case leave this question a doubtful one. It is conclusive always that, unless otherwise expressly provided, the compensation paid to any district attorney,

whether as fees or as larger compensation, for services rendered by him as an attorney or counselor for the United States in any suit or proceeding in any court, or for any other legal service rendered as district attorney in behalf of the Government, must be included in his emolument returns.

District attorneys are required to perform many official duties for which the law has not, at least until very recently, provided any compensation beyond the salary of their office. Some of these duties are very onerous when properly and faithfully performed; for example, the duty of making up issues of appeal, etc., and the duty of examining the fee accounts of officers of the United States courts and chief supervisors of elections. (Act of Feb. 22, 1875, 18 Stat. L., 333.)

But none the less the district attorney must accept as compensation therefor the total fees and salary of his office not exceeding the maximum limited by law.

Referring to the fee bill, section 823 of the Revised Statutes says:

> The following and no other compensation shall be taxed and allowed to * * * district attorneys * * * except in cases otherwise expressly provided by law. * * *

As this prohibition excludes in the most express terms the payment of any compensation to a district attorney which is not expressly provided by law, we fail to see any power in the courts or executive branch to add to such allowances.

To quote from Mr. Attorney-General Brewster in a parallel case:

> It should require, therefore, very clear expression to justify a construction which would destroy or impair the main purpose of the * * * act.
>
> * * * * *
>
> The right to compensation * * * can rise to no higher level than that of its statutory source.

(17 Op., 664, 669.)

The first provision of law looking to the payment of compensation to district attorneys for services not covered by their salary or fees seems to have been made in the sundry civil appropriation act of October 2, 1888, for the service of the fiscal year ending on June 30, 1889. (25 Stat. L., 505.)

This, however, is a temporary provision, being only for that fiscal year. It seems to give a practicable operation to the third section of the act of June 20, 1874 (18 Stat. L., 109), as it provides:

> For payment of district attorneys, the same being for payment of such special compensation as may be fixed by the Attorney-General for services not covered by salary or fees, $5,000.

The like appropriation has been made for the succeeding fiscal years. (25 Stat. L., 977; 26 Stat. L., 409.)

Evidently this appropriation is not intended to pay for services for which *fees* are expressly prescribed in the fee bill, and for which services the statute says no other compensation shall be allowed (sec. 823). It is intended only for official services for which no statute prescribes compensation.

All of the services involved in this action were prior to the fiscal year 1889, and are not affected by that statute, and we refrain from discussion of its effect and scope. As to whether there may be official services not covered by salaries or fees, and, if so, what they are; and whether or not the terms of that appropriation are sufficient to override other provisions of law; and whether, if such allowances are made, they will be part of the official compensation and included within the maximum, are questions that should await a case or cases presenting them.

We submit that the demands of the claimant in this case are clearly in excess of any compensation to which he is legally entitled, and that on claimant's appeal judgment should be affirmed.

J. E. DODGE,
Assistant Attorney-General.
FELIX BRANNIGAN,
Assistant Attorney.

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CLERK.

In the Supreme Court of the United States.

THE UNITED STATES, Appellants,
vs.
THOMAS SMITH.
No. 289.
October Term, 1894.

THOMAS SMITH, Appellant,
vs.
THE UNITED STATES.
No. 345.
October Term, 1894.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF PREPARED BY EUGENE G. HAY.

EPPA HUNTON,
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JOHN F SHEIRY PR

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Brief on the mileage compensation of a district attorney, prepared by, and submitted in behalf of, Mr. Eugene G. Hay, late United States Attorney for the District of Minnesota, who has mileage accounts as such official that will be affected by the decision of the court in this case. It will be observed that Mr. Hay, in using figures, takes them from Sec. 835 R. S., which fixes the maximum compensation of a district attorney at $6,000. These figures, however, are modified as to the claimant in this case by the act of August 7, 1882, 22 Stat., 344, which fixes the maximum compensation of the district attorney of the Territory of New Mexico at $3,500.

With this explanation the brief is submitted as prepared by Mr. Hay.

EPPA HUNTON,
JOHN ALTHEUS JOHNSON,
Attorneys for Thomas Smith.

Is the United States District Attorney required to include in his semi-annual return required by Section 833 *R. S. such sums as are allowed under the 9th paragraph of Section* 824 *R. S.?*

If he is, then these sums must be used in computing the amount which he is allowed to retain under Section 835 R. S. If he is not, then they should not be so included. The answer to this question would seem to turn upon the meaning of the words "fees and emoluments of his office" as used in Sections 833 and 835 above referred to.

Webster's Unabridged Dictionary gives as the definition of fee, "Reward for services rendered or to be rendered, especially payment for professional services of optional amount or fixed by custom or law." In the Century Dictionary fee is defined to be "A reward or compensation for services; recompense." In Bouvier's Law Dictionary this word is defined as "A reward or wages given to one for the execution of his office or for professional services." * * * "Fees differ from costs in this, that the former are as above mentioned a recompense to the officer for his services, and the latter an indemnification to the party for money laid out and expended in his suit."

The word "emolument" is not given in Bouvier's Dictionary, but in both Webster's and the Century Dictionaries it is defined as "The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, perquisities, advantage, gain, public or private." The word perquisite used in the above definition is defined by Webster as "An allowance paid in money or things, beyond the ordinary salary or fixed wages for services rendered, especially a fee allowed by law to an officer for a specific service."

The lexicographical meaning of those words is, therefore, exactly the same as the meaning which attaches to them in their ordinary use and which appeals to the common understanding of all persons. Each of these words conveys the idea of gain or profit. When it is said that a person has received or shall receive a fee of $50.00 for a stated service, there can be no other meaning than that that exact sum has or shall inure to the personal benefit of that person for that service. When it is said that the emoluments of a certain office are $6,000 a year it is meant that there are $6,000 a year "profit arising from (that) office;" that the incumbent will receive $6,000 a year net.

A careful study of the philology of these words, as well as the uniform sense in which they are used, discloses no possible use that would embrace the idea of costs, disbursements or expenses. That meaning will be given to words used in an enactment, which is justified by the standard authorities as well as uniform usage, unless some circumstance which is connected with their use in the act itself or other acts of the same legislature shall vary that meaning.

It is clear, therefore, that the words "fees and emoluments" as used in Sections 833 and 834 R. S. were intended by Congress to mean such amounts as were allowed to the district attorney for services rendered by him, and were not intended to contemplate such amounts as were allowed to him as commutation or reimbursement for expenditures incurred by him for the Government in the discharge of the duties of his office.

The sums allowed for travel are in no sense a fee or emolument, they are not intended to compensate for a service rendered nor do they represent a specific profit inuring to the benefit of the district attorney. In some instances the sum allowed more than pays the amount ex-

pended in travel and in other instances it is not sufficient to pay it, depending entirely upon the circumstances of the travel. A brief history of this form of reimbursement will perhaps aid us in arriving at a right solution of the question here under discussion. In Section 824 above referred to, the word mileage is not used, but instead the term "for traveling" is used, but that it means the same thing as mileage is clear both from the provision itself as well as from the subsequent enactments of Congress; in a number of appropriation bills the mileage of district attorneys has been referred to and legislated upon.

Mileage is defined by Webster as "An allowance for traveling expenses at a certain rate per mile." In the Century Dictionary it is defined to be "Payment allowed to a public functionary for the expense of travel in the discharge of his duties according to the number of miles passed over." Mileage is therefore reimbursement and not compensation.

In the case of Townsend *vs.* the United States, 22 Court Claims 216, the following very terse statement is made by Judge Nott in his separate opinion, and, so far as the principle it announces is concerned, is concurred in by the entire bench, "the universal rule is that where public business necessitates public travel, and the travel is upon public business, the expense of it is borne by the Government." This is true of every department of the Federal Government, and there are very few, if any, public officials who are not by specific provision of statute placed within that rule. Three methods of ascertaining and bearing this expense are adopted. One is by allowing a specific sum per day or per year for the expenses of the official named. This is not intended as any part of their compensation, but is given them to defray their expenses while away from their homes on the business of the Government.

The amount fixed is a compromise between the official and the Government, and is ascertained by the principle of averages. The official is entitled to the agreed amount whether he incurs any expense or travels a mile or not. If the official is economical and seeks the cheapest and least luxurious mode of traveling and living while away from home and can save part of this allowance, he is the gainer; if he is extravagant and seeks the most costly and luxurious conveyances for traveling and places for stopping while away from home, and expends more than the amount allowed, then he is the loser, for he has agreed with the Government that his expenses will not exceed a fixed sum, and the Government has agreed to pay him that sum, and that sum only, whether his expenses exceed or fall below it. The second method is mileage. It is like the first, in that the official and the Government compromise the matter of expenses in advance and agree, the Government that the official shall be paid a fixed sum per mile for every mile he travels, and the official that he will accept the sum in lieu of his actual expenses, and bear all of his own expenses while away from home on the business of the Government. Like the first method, the amount agreed upon may more than cover the official's expenses, or it may not be sufficient, dependent entirely upon the character of the travel required and the tastes or habits of the official, but, unlike it, the official does not receive anything unless he is required to leave his home on public business, and under almost every conceivable circumstance he is required to expend on behalf of the Government a part at least of what he receives as mileage. The third method is by repaying to the official the exact amount expended by him upon the proper vouchers presented, or upon a mere statement of account rendered by him. Under this system every possible expense incurred by the official in the discharge of Govern-

ment business from street car fare to hotel bills is borne by the Government.

So far as our Federal Government is concerned, the mileage method is the oldest one which has the sanction of Congressional enactment. The act of September 22, 1789, 1st Statutes at Large 70, was the first law which provided for the bearing of the expenses of Federal officers of the general Government. It provided that United States Senators and Members of Congress should be allowed, in addition to their salary of $6.00 a day, the sum of six dollars for every twenty miles they traveled from their homes to the seat of Government, and, as if to show that this was intended for reimbursement and not compensation, it was provided that the distance should be estimated by the most usual road from the place of his residence to the seat of Congress. To follow the legislation providing for the compensation of members of Congress in its various changes up to the present time, would perhaps be tedious. It discloses the fact however that the amount allowed them from time to time as mileage, has uniformly been treated by that body as a reimbursement and not as compensation. It shows that the law-making power has itself construed that form of payment to public officials, as not intended to be considered as a part of their compensation for such services as they might render to the Government. And a court when called upon to construe a statute will do no more than to arrive at the intention of the legislature which enacted it. When that body by its own conduct has placed a construction on a substantially similar law the duty of the court is plain.

In the earliest acts of Congress relative to the Judiciary it was expressly stated that the allowance for travel made to the district attorney and certain other officers was for their expense and time in traveling. The United

States marshal is expressly excepted from this provision of the statute which (taken in connection with Section 829, Rev. Stat., par. 26, last par. of Sec., providing that, if the actual traveling expenses incurred by the marshal should exceed his mileage, he may elect to receive the actual expense in lieu of his mileage) clearly indicates the purpose of Congress, from the earliest legislation to the present time, to be to treat and intend mileage as an emolument of the office of United States marshal but as a commutation for expenses of district attorneys and other officials. This view is sustained by the decision of the Supreme Court in the case of Harmon *vs.* U. S., 147 U. S. Rep. 268, where it is held that the marshal is entitled to mileage on each of two or more writs served at the same time, etc. It will not be contended, and this court certainly would not hold, that a district attorney is entitled to double mileage where, upon the same trip, he attends two examinations of two different persons accused of crime, even if held before different commissioners. Another thing which destroys all analogy between the matter of mileage allowed a marshal and that allowed a district attorney, and which indicates the purpose of Congress to treat the two entirely differently, is the fact that a marshal appoints his own deputies, may appoint as many as he pleases, is allowed mileage for their travel, and is permitted, by statute, to retain for himself a percentage of the fees and mileage earned by each. Such items of mileage then as he may be required to embrace in his semi-annual return, and which are used in computing the maximum to which he is entitled, simply represent the profits of his office inuring from the services of his deputies and, as shown, he receives actual expenses instead of mileage unless there is a profit to him in the mileage. So much then as to what seems to have been the intention of Congress in providing for mileage for a district attorney.

[It is observable that the mileage of a marshal is a taxable fee and recoverable as costs; but not so with the mileage of a district attorney. And attention is here called to the argument of claimant's counsel that the "fees" which are to be considered as "emoluments" within the meaning of the statutes that prescribe the maximum "personal compensation" of judicial officers are the "taxable fees" of the officers and not their allowances, like the mileage and per diems of a district attorney, which are made for another purpose and which are never taxed as costs in a cause.]

Let us now look at the matter for a moment, independently of the light thrown on the subject by the meaning of the words used or the history of the legislation, but entirely from the standpoint of the practical operation of the law. It is the clear intent and meaning of Sec. 835 that the United States District Attorney shall have for his personal compensation in the discharge of the duties of his office the net sum of $6,000, provided the services rendered at the prescribed fees should reach that sum.

Let us now assume, for the sake of argument, that the sums paid to a district attorney for his services on all accounts, exclusive of mileage, for the period of a calendar year, aggregate the sum of $6,500; that his clerk hire and office expenses, which are duly allowed to him, amount to $1,000, leaving him the sum of $5,500 for himself; that, in addition, he shall have traveled on the public business 9,000 miles in that year and is entitled to the sum of $900 for mileage; that he is required to return this sum as a fee or emolument of his office and that $400 of it is held as in excess of his maximum compensation; that at least $400 of the total sum to which he is entitled as mileage has been paid out by him for expenses of travel, and it will be seen that he has only received the aggregate sum of $5,600 for his services and mileage, whereas he

earned $400 more than that, which was withheld from him. It may be answered that he should put into his emolument return the items which make up this $400 of expenditure and receive credit for it, in which event the $400 withheld would be paid him. There are many answers to this suggestion. The first is that the accounting officers of the Government have never allowed the actual expense of an official entitled to mileage, no provision is made either by law or Department rule for the ascertainment or return of such expenses, and mileage in this respect is treated by the Government just as it is declared to be intended in the case of Townsend *vs.* United States, above cited, as "a fixed commutation for a fluctuating outlay, resorted to for the purpose of saving the one party from the keeping and the other from the auditing of ending prolix accounts made up of petty items." The present custom of the accounting officers is to treat mileage as a fee or emolument of the office of district attorney in ascertaining the maximum of his compensation, but as a commutation when ascertaining the expenses of his office. But, were this not true, let us see what might be the result of requiring him to render an account of all the expenses of his travel in his semi-annual return and treating mileage as a fee or emolument. Suppose a district attorney should earn in a calendar year the sum of $6,000 above the amount allowed him for clerk hire and other office expenses and exclusive of mileage, and that his mileage amounted to $300 and that his expenses in the travel out of which he became entitled to the mileage aggregated $400; would the Government pay him $400, the amount expended, $300, the amount of mileage, or would it refuse to pay him anything upon the ground that he had received his maximum compensation in fees. If the excess of mileage over actual expense is to be considered a fee or emolument to be used in com-

puting the maximum compensation, then, if the actual expenses is greater than the mileage, the Government should make up the deficit to the attorney. This would place the district attorney in the third class above referred to, the class of officers who are paid their actual expenses, but this is not the class in which Congress has placed them, and the accounting officers have no power to change the arrangements which Congress has made.

The statutory fees allowed a district attorney are all small. The salary is but $200 a year. It might be possible in a frontier district, large in area and small in population, with but primitive facilities for travel, that more than one-half of the total amount due the district attorney would be for mileage and that the expense incurred by him in traveling to attend to the business for which the mileage was due was greater than the amount due him for mileage, that the distances were so great and travel so slow that the discharge of the duties of his office occupied all of his time leaving him but the small amount due him as fees and salary for his year's labor. Would the Government make up to him the differences between his expenses and his mileage, or would he have to bear this out of his small earnings as fees. There can be no question but that there is no authority of law for making up to him the difference, and by the same rule of law there is no authority for collecting the difference from him when the balance is the other way. This is what the Government would be doing were the district attorney required to include mileage in his semi-annual return. To illustrate, suppose the district attorney earned, exclusive of mileage, $6,000 a year over and above his duly allowed office expenses; this is the exact amount to which he would be entitled. In addition to this there is due him as mileage $1,000; of this sum he only expended in traveling $500. The Government by compelling

him to include mileage in his emolument return and a statement of his actual expense would be collecting back from him the difference between the actual expense and the mileage. If the mileage and the actual expense were the same, or if the expense exceeded the mileage, there would be no necessity to include it, for the Government would not make up the difference to the district attorney; the only time when it would be necessary or proper to include mileage in the semi-annual emolument return of the district attorney would be when the mileage exceeds the expense. This would neither be just or equitable and can not be the true construction or the law ; such certainly was not the intention of Congress. It will certainly not be contended (although that is the effect of the rule adopted in the accounting offices) that the mileage allowed a district attorney should be used in computing the maximum compensation to which he is entitled and no credit given for his actual expenses. Such a rule might render the office a very burdensome one in some districts, as in a large district the attorney's compensation would diminish in the same proportion that his business increased and the temptation to neglect his duties would be very great, in fact it might come to the point where he would make an annual contribution from his private means for the privilege of serving the Government in official station. At the time this law (Sec. 824 R. S.) was enacted (1853) ten cents a mile was none too high for the average rate of transportation.

Let us now look at it in another light. Suppose the district attorney was given by law a salary of $6,000 a year, to be paid at stated intervals, as the salary of judges and many other Federal officers are paid; that in addition to this salary he was allowed mileage as now provided by law, no one would contend that he was only entitled to so much of the mileage as he had expended; but

this illustration only tends to show the fallacy of the Government's contention in this case. The original theory of the law upon which the district attorney is paid by fees, was that the $200 salary and the per diems should be paid out of the Treasury and that the docket and other taxable fees should be collected by the district attorneys from the litigants; hence the use of the words in Section 835 R. S., "No district attorney shall be allowed by the Attorney General to *retain* of the fees and emoluments of his office, etc." But by subseqent legislation, chiefly in appropriation bills, all fees became payable out of the United States Treasury. The mileage was always payable out of the Treasury and has been from the beginning intended, considered, and, so far as the courts have passed upon it, construed to be a commutation for expenses.

The meaning of the language used in the law, the history of legislation allowing mileage, as well as the practical operation of such legislation as applied to district attorneys, all point to this construction and, as it seems to me, admit of no other.

There is one other consideration which would seem to bind the Government to this view. Sec. 1063 provides for the comptroller securing the opinion of the Court of Claims on all questions of this character. The clear implication of this statute, is that the decision of that court unappealled from (if in fact there is any authority for an appeal) is intended to stand as the law by which the Government is bound. The Court of Claims is made by this statute the arbiter of every dispute of this character which may arise between the claimant and the Government. The clear intent and meaning of this is that the opinion of the court of claims and not that of the First Comptroller is the law under which the district attorney accepts his office and enters upon the discharge of its duties. As long ago as April, 1887, the Court of Claims,

in the case of Townsend, above cited, decided that mileage allowed by law to district attorneys was intended as a commutation for expenses and not for compensation and was not an emolument of his office. The same opinion was expressed by the Attorney General at a much earlier day in Attorney General's opinions, Volume 9, Page 417. So, for seven years at least, district attorneys have been holding their offices with this understanding; have accepted the same with an implied agreement growing out of these decisions that such was to be the rule.

EUGENE G. HAY.

OFFICE SUPREME COURT, U. S.
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APPEALS FROM THE COURT OF CLAIMS.

BRIEF IN BEHALF OF THOMAS SMITH.

This case is here on appeal and cross-appeal from a judgment of the Court of Claims; and the question at issue is whether the claimant, Thomas Smith, who was the district attorney of the United States for the Territory of New Mexico during the calendar years 1886, 1887 and 1888, has been paid of his earnings for those years respectively as much as he is entitled to receive.

The claimant rendered accounts against the Government for the years above named to the amount of $19,230.80 (Par. 1 of Finding II; p. 9 of printed record). Those accounts were allowed and certified as correct by the accounting officers of the Treasury to the extent of $18,605.80 (Par. 2,

ditto). Of this amount, however, but $14,266.34 was certified for payment (par. 3, ditto). The accounting officers refused to certify any further sum for payment on the plea that the said $14,266.34 was the maximum amount which the claimant under the law could receive and retain for those three years (par. 1 of Finding IV; p. 11 of printed record).

There was thus a declination on the part of the accounting officers of the Treasury to certify for payment $4,339.46 of the amount which they admitted the claimant to have earned. They had also in his accounts made a disallowance of $595 to which the claimant excepted, and to recover these sums, amounting to $4,934.46, the claimant filed two suits in the Court of Claims. One of the suits embraced the unpaid earnings of the calendar years 1886 and 1887 (pp. 1 to 4 of printed record); and the other those of the year 1888 (pp. 4 to 7, ditto). The two suits were consolidated, however, and tried as one (p. 8 of printed record).

Of the $4,934.46 thus sued for $2,843.66 are per diem charges and $1,270.80 are mileage charges (par. 3 of Finding IV; pp. 11 and 12 of printed record). The remaining $820 consists of charges for services rendered in special cases in which the United States, though not a party to the record or directly interested, was supposed to be concerned or affected by the matters involved in the litigation. In these cases the claimant appeared by direction of the Attorney General, except as to one in which he appeared by direction of the court (par. 2 of Finding III; p. 10 of printed record). The services in these cases were regarded by both the claimant and the Attorney General as rendered in an unofficial capacity and as not provided for by the district attorney's salary or by the statutory fee bill (ditto); and for these services the claimant charged $1,910 (par. 1 of Finding III; p. 10 of printed record); and this amount was approved as just and according to law by the district court of the Territory which acted in this regard with the jurisdiction of a district or cir-

cuit court of the United States (ditto, and par. 1 of Finding II; p. 9 of printed record).

These charges were submitted to the Attorney General, and he, barring the case in which the claimant appeared by direction of the court, approved the charges in the amount of $1,310 (par. 3 of Finding III; p. 10 of printed record), in which amount they were allowed by the accounting officers of the Treasury (par. 5 of Finding III, ditto), who also allowed $5 in the other case (ditto), thus making the amount allowed by them in these special cases to be $1,315, of which amount, however, they certified for payment but $1,090 (par. 6 of Finding III, ditto), the plea against a further payment being that already mentioned, namely, that the claimant, without a further payment, had received the maximum compensation for the years above named (par. 1 of Finding IV; p. 11 of printed record). The services performed by the claimant in these cases were reasonably worth $1,910, the amount which the claimant had charged for them (par. 9 of Finding III; p. 11, ditto).

This suit, therefore, as may be seen from the foregoing statement, involves simply the consideration of what earnings should be charged to a district attorney in the computation of his "maximum compensation" as it is called; in other words the suit involves the construction of Secs. 833 and 835 of the Revised Statutes of the United States. (Modified for New Mexico by the act of Congress of August 7, 1882, 22 Stat., p. 344).

These statutes contain the limit that is imposed upon the compensation which a district attorney is authorized to receive and retain. Outside of these statutes, and as long as he is within the limits imposed by them, he is authorized to receive and retain everything that the law has provided for him. Any payment or allowance that is not within the scope or purview of Sec. 833, he takes without liability to the government

to account therefor; it is his without regard to the question of maximum compensation prescribed in Sec. 835.

In the case at bar the accounting officers of the Treasury made no distinction as to the character of the claimant's earnings whether per diems, mileage, salary, docket and other fees, or special compensation for services not covered by salary or fees. They regarded that the claimant, under Sec. 833, R. S., should make return of everything and they charged him accordingly in the action which they took under Sec. 835, R. S.

The claimant, on the contrary, did not think that either mileage, or per diem, or special compensation for services not covered by salary or fees, entered into the purview of Sec. 833, R. S. The mileage he regarded simply as a commutation, or allowance, for the expense of travel; the per diem he regarded as a similiar matter to cover the expenses of living, board and lodging, while attending on sessions of the court; and the special compensation, being for services not enjoined upon the district attorney by statute, nor measured by statutory rules of compensation, but required at the pleasure of the Attorney General, he regarded as also exempt from the operation of Sec. 833, R. S.

On the contention thus made, the judgment of the court of claims was in favor of the claimant for $1,270.80, the amount of the claimant's demand for unpaid mileage, on the ground that mileage was not a matter to be charged against a district attorney in the settlement of his emolument returns under Sec. 835; but the judgment was in favor of the defendants as to the rest of the contention, on the ground that both "per diems" and "special compensation" were matters properly chargeable to a district attorney in the computation of his personal compensation. From so much of this judgment as was in favor of the claimant the government noted an appeal to this court; and the claimant likewise noted an appeal from

so much of the judgment as was in favor of the defendants (p. 21 of the printed record).

The contention of the claimant in this suit is therefore threefold, namely, that neither mileage, nor per diem allowances, nor special compensation for services not covered by salary or fees, is properly embraced by the return of official emoluments required by Secs. 833 and 834 R. S. U. S.; and hence that neither of said items was properly chargeable to him in the computation of the $3,500 which the law had prescribed as his maximum personal compensation. And the action of the Court of Claims sustaining this contention as to mileage but overruling it as to the other two points is now here for review.

1. *Is Special Compensation allowed to a district attorney for services not covered by his salary or fees embraced in Sec. 833 R. S.?*

Not every fee or emolument of a district attorney is required to be included in the returns prescribed by Sec. 833, R. S.

The commissions which a district attorney receives upon collections under the revenue laws and the compensation which is paid to him for defending officers of the revenue is specifically excepted from such returns by Sec. 834, R. S.; and this section further shows that no fee or emolument is required to be included in such return by a district attorney, unless the district attorney be entitled to the fee or emolument "by reason of the discharge of the duties of his office, as now or hereafter prescribed by law." But in these special cases the services performed by the claimant were not requested, nor were they rendered, as a part of the claimant's official duty; nor did the claimant charge for them according to the statutory fee bill that governs district attorneys (par. 1 and 9 of Finding III; pp. 10, 11 of printed record).

The services were performed and charged for the same as though the claimant had not been the district attorney of the United States. The situation, as viewed by both the claimant

and the Attorney General, was that the claimant was entitled to receive for these services what the services were reasonably worth. The services were regarded as performed in an unofficial capacity, the same, in effect, as if the claimant had discharged the duties of two independent positions or offices, in one of which the fees or compensation were determined by statute, in the other by the principles of the *quantum meruit*. If it was no part of the official duty of the district attorney to appear in these special cases, all but one of which were in the courts of the Territory as contra distinguished from the courts of the United States (par. 7 and 8 of Finding III; p. 11 of printed record), then clearly the amount to which he is entitled for his services in these cases should not be treated as an "official emolument" of his office of district attorney. The principle relative to extra or unofficial services by an officer is stated in U. S. *vs.* King, 147 U. S., 678. That was a suit brought by King, a clerk of court, for a per diem compensation similar to that which was paid the jury commissioner, with whom, under the act of June 30, 1879, 21 St., 43, the clerk acted in the selection of the jury lists. The clerk was not made a jury commissioner by that statute, but a new duty was imposed upon him as clerk, and no provision was made for his compensation. The court in laying down the rule that governed the decision of the case said (p. 679):

"The question of compensation for extra services has been the subject of considerable discussion in this court and of some legislation by Congress. The ordinary rule, in the absence of legislation, is that, if the statute increases the duties of an officer by the addition of other duties germane to his office, he must perform them without extra compensation; but if he is employed to render services in an independent employment not incidental to his official duties he may recover for such services."

The statute had imposed the selection of names for the jury box "upon the clerk of such court and a commissioner" (21 St., p. 43); and King's claim was disallowed by the court

because the services for which he was seeking compensation "were not rendered in a distinct capacity as jury commissioner, but were incidental and germane to his regular duties as clerk" (p. 681). Clearly the clerk was only discharging a part of his official duty when selecting names for the jury box, and he could not therefore rightfully set up a claim for extra or special compensation over that provided for him by law. Not so in the case at bar. The official duty of a district attorney, as declared in Sec. 771 R. S., is to "to prosecute delinquents for crimes and offenses cognizable under the authority of the United States," "to prosecute all civil actions in which the United States are concerned," and "to appear in behalf of the defendants in all suits or proceedings against collectors or other officers of the revenue." Under neither of these heads was the claimant acting in these special cases; he was not prosecutor in the sense of *dominus litis*, nor was he defending an officer of the revenue. He rendered service, being thereto properly requested, not incumbent upon him by reason of his official position, and not provided for in the statutes that fixed his compensation as district attorney. He charged for these services as on the *quantum meruit* and the proof is that they were worth $1,910 of which he has been paid but $1,090. The claimant was certainly not disqualified for the rendering of these services by reason of the fact that he held the office of district attorney; and, if it be possible for the same party to receive the fees and emoluments of two offices, the duties of both of which he can discharge, much more ought it to be possible for a party to receive extra or special compensation for services which are not covered by the salary or fees of his office. Indeed, this principle as applied to district attorneys is expressly recognized and left unaffected by the act of June 20, 1874, which reads as follows (18 St., p. 109):

"Sec. 3. That no civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States

beyond his salary or compensation allowed by law: *Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees."

But if these fees for services outside of his official duties as district attorney, are not authorized by statute, as maintained by the Court of Claims, it is contended that when the claimant rendered these services, at the request of the Government by the Attorney General, there was an implied promise on the part of the Government to pay for them, and on this promise the claimant can rest his demand. Nor is there any difficulty in fixing the amount of compensation for such services. On the implied promise the Court of Claims has given the *quantum meruit* valuation, which is the same that was fixed by the court before which the services were rendered, and which knew their value.

2 and 3. *Are the mileage and per diem allowances of a district attorney comprehended in the returns required by Sec. 833 R. S.?*

Sec. 835 R. S., which prescribes the action to be taken in regard to the semi-annual returns required by Sec. 833, says: "No district attorney shall be allowed by the Attorney General to retain of the fees and emoluments of his office which he is required to include in his semi-annual return * * * a sum exceeding" &c., &c.

The expression "shall not be allowed to retain" implies that the money shall have come to the hands of the district attorney. Shall have come to his hands from what source? If the law-makers had supposed that the Treasury of the United States would be the chief source of supply such phraseology as the above would hardly have been used; for it would be very poor policy to pay out money when it was apparent to those paying it out that it would have to be demanded

back again. It would be better for the Treasury officials to pay out only such sum as the district attorney would be authorized to retain instead of paying out a larger sum and then demanding the return of the excess. Indeed, had the Treasury officials in the present case paid over to the claimant the full amount of his earnings, I presume it would now be the Government suing Smith for $4,934.46 instead of Smith suing the government for that amount. Evidently the framers of the above law supposed that the district attorney would collect largely from other sources than the Government; and the attorney for the Government, when successful, is certainly entitled to his taxable costs from the losing party the same as the successful attorney of private litigants. Indeed, Sec. 857, R. S., expressly provides: "The fees and compensation of the officers and persons hereinbefore mentioned, except those which are directed to be paid out of the Treasury, shall be recovered in like manner as the fees of the officers of the States, respectively, for like services are recovered." And Sec. 844, R. S., is equally explicit, as showing that the possible surplus of the district attorney's emoluments is expected to have come from some other sources than the Treasury of the United States. It is as follows: "Every district attorney * * * shall, at the time of making his half-yearly returns to the Attorney General, pay into the Treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney General, any surplus of the fees and emoluments of his office which said return shows to exist over and above the compensation and allowances authorized by law to be by him retained." That the law under consideration in this case contemplated that the district attorneys and other judicial officers, who are paid by fees, should collect their fees from the unsuccessful party to the litigation is clearly shown in the opinion of the district judge of the eastern district of Pennsylvania, concurred in by the circuit judge, and reported in 2 Fed. Rep., p. 494, *In re* U. S. *vs.* Cigars. According to

that opinion the Government, if it loses its case, is liable to the district attorney and other officers for their prescribed fees; otherwise the fees are payable as costs by the other party. But the fact has come to be that district attorneys collect all their fees from the Government, and, if costs in a case are recovered in favor of the Government, the taxable attorney's fee, along with the other costs, is covered into the Treasury as a source of revenue. Under the practice as it now obtains, the Treasury officials are able, as in the present case, to hold the purse strings and dole out his earnings to a district attorney as they may think him to be entitled thereto under the law.

As further emphasizing the matter of taxable costs, and as helping to indicate the relation of taxable costs to the question before us, it is worthy of remark that the emoluments of the district attorney which Sec. 834 R. S. excepts from the returns required by Sec. 833 are not a part of the costs that are taxable in a cause. Neither the two per cent. commission on revenue collections nor the compensation paid on the approval of the Secretary of the Treasury is ever included in the taxed bill of costs. The same is true of the district attorney's mileage and per diem. These are not taxable costs in a case, and never have been. They are paid, and always have been, direct from the Treasury. They are not fees in the sense that the docket and other taxable fees are, such, for instance, as the fee of $2.50 for every deposition that is admitted in evidence. Indeed, the "just and suitable compensation" of a district attorney for services in prize causes, which is "to be adjusted and determined by the courts," is directed to be taxed as "as costs in the cause" (Sec. 4646, R. S.); and "any excess" over $3,000, the amount of compensation in this class of cases which a district attorney is allowed to retain in addition to the maximum compensation prescribed by Sec. 835, "shall be paid by the district attorney into the Treasury of the United States" (Sec. 4647). Here, then, it is the excess

of taxable fees over a certain amount that is to be paid into the Treasury.

With some officials a per diem is the method that is adopted of paying them for their services; but in the case of district attorneys, who are paid a salary of $200 or $250 and various docket and other fees, some taxable and others non-taxable, the per diem and mileage allowance must have been adopted for a different purpose than to be reckoned as "personal compensation."

Two distinct elements or considerations enter into and determine the charges of an attorney, namely, (1) the expenses or disbursements necessary to be made and (2) compensation for the services to be rendered. As expressed in Trustees *vs.* Greenough, 105 U. S., p. 533: "Of course, it is well understood that costs as between solicitor and client include all reasonable expenses and counsel fees and are not, like costs as between party and party, confined to the taxed costs allowed by the fee bill;" or, as expressed in the prior case of *In re* Paschal, 10 Wall, pp. 493–4: "Whilst, as between party and party in a cause, the statutory fee bill fixes the amount of costs to be recovered, as between attorney or solicitor and client, a different rule obtains. The claim of the attorney or solicitor in the latter case extends to all proper disbursements made in the litigation and to the customary and usual fees for the services rendered."

Both the elements here mentioned are found in the fee bill or schedule of charges which Congress established for district attorneys in their professional relation with the Government. The "reasonable counsel fees," "the customary and usual fees for the services rendered" are fixed by that schedule so far as the district attorneys and the Government are concerned; and these fees, thus prescribed for district attorneys, are the same as the taxable attorney's fees between party and party in all the courts of the United States. But the other element, that which is intended to meet expenses as distinguished from

personal compensation, is commuted by that schedule into a fixed allowance as between district attorneys and the Government; and these commuted fees of a district attorney, mileage and per diems, are not taxed in favor of the prevailing party in a cause no matter whether such party is the Government or a private suitor.

The words "fees and emoluments" as used in Secs. 833 and 835 R. S., or "fees and salary" as used in the act of August 7, 1882 (22 St., 344), must have been intended by Congress to apply to the amounts which were allowed as compensation to the district attorney, and not to the amounts which were allowed as commutation or reimbursement for certain kinds of expenditures. In other words, the "fee" or "emolument," as contemplated in those statutes, is the pay or compensation which is attached to the performance of labor or service peculiar to the office or function of an attorney. Traveling cannot be called professional labor on the part of an attorney at law; nor is time consumed in mere attendance on sessions of the court labor of a professional kind for an attorney; and still the bare attendance on court is what entitles a district attorney to his per diem. For the professional services that a district attorney may render there is compensation provided either in the salary or in a fee. But for those things which do not denote professional labor, but which are incident or collateral thereto, like travel to the court and attendance thereon, the law has established an allowance or commutation to be received by the attorney in lieu of all demands in the premises. And hence the language of Judge Schofield, of the Court of Claims, who, in Townsend *vs.* U. S., 22 Ct. of Clms. 207, says: "The salary and docket fees were apparently intended as compensation for all professional services in the preparation and trial of suits.

"Having thus provided for professional services, the law then undertakes to reimburse them (district attorneys) for all outlays necessarily incurred in the discharge of their duties.

It pays them back all sums expended for clerk hire, fuel, lights, and other office expenses; *for traveling expenses, which are estimated and compromised at ten cents a mile, and for the consumption of time about the courts, whether engaged therein or not, estimated and compromised at five dollars a day. As these allowances are designed to reimburse expenditures, not to compensate for professional services,* the district attorneys become entitled to them only when the expenditures have been incurred." And Judge Nott, in the same case: "Mileage is an agreed commutation for a fluctuating outlay resorted to for the purpose of saving the one party from the keeping and the other from the auditing of endless prolix accounts made up of petty items. It is an ordinary though not the invariable form of reimbursement for travel in the public service, and is in no case intended as compensation."

It is proper to bear in mind of course that the Government does not undertake absolutely to pay to a district attorney his expenses of clerk-hire, stationery, fuel, lights, &c., &c. It simply undertakes to pay to him the fees and emoluments which he may earn in his office, whether they be much or little; and from these earnings he must pay his expenses of clerk-hire &c. If, after paying these expenses, there be an excess of personal compensation above the maximum provided by law, he must turn over the excess to the Government; if there be a less amount than the maximum, he cannot look to the Government for the deficiency, for the Government does not guarantee to a district attorney his maximum compensation, but simply the fees and emoluments which he may earn under the law. It pays him nothing for office expenses or clerk hire *as such;* it simply allows him to use these expenses, when authorized by the Attorney General, as an offset to an *excess* of personal compensation.

The foregoing, it is hoped, is sufficient to make clear that the mileage and per diems of a district attorney are not intended as personal compensation, but as a commutation or al-

lowance for expenses, and hence that they have no place in the purview of Sec. 833 R. S., and should not be regarded in computing the excess of the personal compensation of a district attorney under Sec. 835 R. S.

It will be observed that the accounting officers, in ascertaining his personal compensation, not only charged the claimant with his mileage and per diem allowances, but, having done that, declined to credit him with the expenses incident to the earning of those allowances (par. 4, Finding II; p. 9, of printed record.) Clearly their action in this matter cannot be sustained. If the claimant were not entitled to mileage and per diem without regard to "maximum personal compention," he would at any rate, in the computation of his excess of personal compensation, be entitled to credit for the expenses incurred in that behalf.

It is also submitted that Sec. 833 R. S. has regard only to the fees and emoluments which are fixed by statute for services rendered in the discharge of official duty, and not to the compensation paid to a district attorney for services not covered by his salary or fees.

It is submitted, therefore, that the fees and emoluments of the claimant earned within the years 1886, 1887 and 1888, as herein above set forth, are not in excess of his maximum personal compensation as prescribed by law; and hence that the full amount of his earnings as herein mentioned should be paid to him for those years respectively.

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154-346

In the Supreme Court of the United States.

THE UNITED STATES, Appellants,
vs.
THOMAS SMITH.
No. 289.
October Term, 1894.

THOMAS SMITH, Appellant,
vs.
THE UNITED STATES.
No. 345.
October Term, 1894.

APPEALS FROM THE COURT OF CLAIMS.

REPLY BRIEF IN BEHALF OF APPELLANT IN NO. 345.

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APPEALS FROM THE COURT OF CLAIMS.

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It is not, and never has been, the official duty of a district attorney to appear in all cases in which the United States have a concern or interest. Unless the United States is the party plaintiff, so that the district attorney has the meritorious control in court of the prosecution, whether civil or criminal, or unless the defendant is either an officer of the revenue, sued as such, or the United States themselves, sued under the act of March 3, 1887, "An act to provide for the bringing of suits against the

Treasury of the United States. So stood the law in 1856. In the act of August 16th of that year (11 Stat., 50, Sec. 12, now Sec. 299, R. S.), we have the following:

"SEC. 12. That all accounts of the United States district attorneys for services rendered in cases instituted in the United States or State courts, when the United States is a party in interest but not of record, or in cases instituted against the officers of the United States or their deputies or duly appointed agents, for acts committed or omitted or suffered by them in the lawful discharge of their duties, shall be audited and allowed as in other cases, assimilating the fees, as near as may be, to those provided by said act of February 26, 1853, for like or similar services."

The effect of this statute, read in the light of the law as it was at the time of its enactment, is plainly seen to be simply to prescribe a rule for the payment of district attorneys in cases in which they were the counsel retained by the heads of departments for services not a part of their official duties. This statute did not enlarge the official duties of district attorneys; it did not make it incumbent upon district attorneys, *ex officio*, to appear in the cases which it mentions; indeed, it would not have been proper (as held by Attorney General Stanbery in 1867, 12 Op. 133) for them so to appear unless specially retained or requested thereto by the proper authority. If a district attorney, however, were so retained, in preference to other counsel, then this statute spoke as to the compensation that should be paid him. And the fixing of the compensation, the "assimilating" of the fees, here provided for, was a function claimed and exercised by the "head of the department" that employed the attorney. In other words, this whole provision was nothing more nor less than the prescribing of the rule of compensation that should thereafter be observed by the heads of departments

in the fixing of pay for the unofficial work of district attorneys done at their request; and the rule was "to assimilate the fees, as near as may be, to those provided by the act of February 26, 1853, for like or similar services." And, in the application of this rule, the heads of departments did not feel bound to adhere blindly and slavishly to the fee-bill. They assumed to exercise a degree of judgment in making the assimilation; and properly; for the process of *assimilation* to the fee-bill, as provided in this act, was not mere *identification* therewith.

Then came the act of March 3, 1863, which affected the situation slightly. The change consisted in this—that, while the act left unaffected the power to employ *any attorney*, as theretofore, in cases like the preceding, it nevertheless made it the duty of the district attorney, *unless otherwise instructed by the Secretary of the Treasury*, to appear in behalf of revenue officers when sued in respect of their official acts; but the compensation to be paid in these suits against officers of the revenue, whether paid to a district attorney or to other counsel, was still such sum as, "certified by the court in which the suits or proceedings were had to be reasonable and proper," should be "approved by the Secretary of the Treasury;" and, as if in recognition of their former unofficial character, the compensation for these services in behalf of revenue officers was expressly excepted, and is still so excepted in Sec. 834, R. S., from the returns of "official" emoluments required by the fee bill of 1853. Compensation for these services, prior to this act of 1863, was not an official "fee" or "emolument" within the meaning of the act of 1853, requiring returns to be made of all such "fees and emoluments;" and now, when it was made, by the act of 1863, the official duty of the district attorney to render such services, *unless otherwise instructed*, the compensation therefor was still directed to be treated

as theretofore, that is, excluded from the "official" emoluments with which the district attorney was chargeable. We will quote sections 12 and 13 of this act of March 3, 1863, 12 Stat., 741:

"SEC. 12. That in all suits or proceedings against collectors or other officers of the revenue for any act done by them, or for the recovery of any money exacted by or paid to such officer, and by him paid into the Treasury of the United States in the performance of his official duty, in which any district *or other* attorney shall be directed to appear on behalf of such officer by the Secretary or solicitor of the Treasury, or of any other proper officer of the Government, such attorney shall be allowed such compensation for his services therein as shall be certified by the court in which such suit or proceedings shall be had to be reasonable and proper, and approved by the Secretary of the Treasury.

"SEC. 13. That in all suits or proceedings against collectors or other officers of the revenue for any act done by them, or for the recovery of any money exacted by or paid to such officers, which shall have been paid into the Treasury of the United States, it shall be the duty of the respective district attorneys within the district where such suit or proceedings shall be had, unless otherwise instructed by the Secretary of the Treasury, to appear on behalf of such officers."

From the statutes which we have thus quoted, which bring us down to 1863 and show us the whole duty of a district attorney as set forth in Sec. 771, R. S., it will be seen that there were still cases outside of the official duty of a district attorney in which the heads of departments were at liberty as theretofore to employ counsel; and they continued so to do, employing either district attorneys or other counsel as they saw proper until 1870, when the Department of Justice was organized. The Attorney General thereupon became possessed of the duty of furnishing all counsel of which any of the

departments might be in need; and he continued the practice which had always prevailed of employing counsel for such services as were unofficial to a district attorney; and, if the counsel so employed was a district attorney, he paid him as theretofore by reference to the act of 1856, above mentioned (now Sec. 299, R. S.). In 1887 friction arose between the accounting officers of the Treasury Department and the Attorney General. The accounting officers at that time (contrary to the practice that had always previously prevailed) had begun, themselves, to fix the compensation in these cases. Claiming that the services rendered were part of the official duty of the district attorney, they were applying the fee-bill to them the same as prescribed for official services. The Attorney General stood upon the old-time prerogative of himself fixing the compensation. The act of 1853 had committed the matter, in express terms, to the head of the department; and the act of 1856 had simply enjoined (upon the head of the department) a rule to be considered by the head of the department) in the fixing of the compensation; and the judgment of the head of the department was not to be reviewed by the accounting officers; and the act of June 20, 1874, 18 Stat., 109, showed that no change in the law in this regard had been made or intended. This controversy was on when Congress, in 1888, 25 Stat., 545, made the legislative declaration on an appropriation act, which has been adhered to in all subsequent appropriations, confirmatory of the practice which had previously prevailed, namely, of permitting the Attorney General (formerly the head of the department employing him) to fix the compensation of a district attorney for services which were unofficial.

The words of the appropriation acts here referred to are as follows:

"For payment of district attorneys, the same being for payment of such special compensation as may be fixed by the Attorney General for services not covered by salary or fees, $5,000."

And that the Department of Justice (notwithstanding the decision of the Court of Claims in the case at bar) has continued to regard as correct the construction of the law which is here given, and the practice which has prevailed thereunder, as above described, is apparent from the decisions of the present Comptroller of the Treasury, appended to the brief of the appellee, herein filed. Those decisions show simply that the present Comptroller has resumed against the Department of Justice the contest of 1887, and that he is defying the legislative declaration made in that year on the merits of the controversy, and repeated every year since. By his decisions, herein exhibited, so far as they embrace cases like the present one, the Comptroller is simply nullifying acts of Congress in that he is declining to permit the Attorney General to use appropriations which Congress, by express words, has placed at the disposal of the Attorney General, or, if this be stating the case too strongly against the Comptroller, and it be desired to find palliation for his acts as a guardian of the public treasury, the palliation must be sought in the reason which is appended to some of his decisions. It is stated as follows in the one concluding on page 42:

"As the claimant has the right to resort to the courts if the decision of the Comptroller is against him, whereas the decision of the Comptroller, if against the United States, is final and conclusive, the only way to have the courts determine the question is to decide against the claimant, which is accordingly done."

Congress, in order that there might be no doubt or misunderstanding in regard to this matter, coupled the

appropriations for special compensation as above made with another, which other is declared to be "*for payment of the regular fees provided by law for* OFFICIAL *services.*" The appropriation theretofore had been expressed simply "for payment of United States district attorneys" 24 Stat., 541; and, by thus breaking the appropriation up into specific heads, Congress declared as to the questions of dispute which had arisen between the accounting officers and the Attorney General.

The law which is contained in section 363, R. S., has no application to the case at bar, for the assistants to district attorneys there provided for are assistants to help district attorneys *in the discharge of the duties of their office.* To designate or appoint a person other than a district attorney to perform services in cases which are unofficial to a district attorney is not to make such person an assistant to the district attorney, nor is it to require of him services as such an assistant.

Nor has Sec. 365, R. S., any significance in this case; for the certificate there required of the Attorney General (which is said to be wanting in this case) is simply something in the nature of evidence to be furnished by the Attorney General to the accounting officers of the Treasury, and the absence of such a certificate is certainly not a matter to be raised in objection against an attorney who has nothing whatever to do with the making of such a certificate, who has no occasion to question the act of the Attorney General in retaining him for special work, and who goes ahead and renders the services for which employed. The fact is that the accounting officers, in acting on the accounts of the claimant, made no objection to them under Sec. 365; and for the very good reason that the services charged for were not rendered "as an attorney or counselor to the United States or to any branch or department of the Government thereof," and

not having been so rendered, there was no room for the operation of Sec. 365.

We have now reviewed the statutes as affecting the matter of "special compensation" to a district attorney "for services not covered by his salary or fees." The salary of a district attorney, as declared by the statute which first created it (act of February 28, 1799, 1 Stat., 625), is in "full compensation for all extra services," that is, for all services which it is his duty, *as district attorney*, to render, if there be no fee expressly provided, he finds compensation in his salary. The "salary and fees" of a district attorney are coextensive, and always have been, with his official duty, and to pay him "for services not covered by his salary or fees" is to pay him for unofficial services. What unofficial services are; how they have always been rendered and paid for; how Congress, in the act of June 20, 1874, 18 Stat., 109, expressly recognized and approved the employment and payment of district attorneys for such services; and how Congress again, in 1888, made a legislative declaration on the subject, has been indicated, and we shall not further protract the discussion.

It is too plain for argument that the "fee" required to be returned by a district attorney under Sec. 833, R. S., is an "official" fee, or fee for "official services," which certainly does not embrace the "special compensation" above described. And that the purpose of the statutes now contained in Secs. 833, 834 and 835, R. S., is to have an accounting for such fees only as are given by way of "personal compensation," is also too plain for argument. No allowance, or "fee," or "compensation," call it by what name you please, not given and intended as "personal compensation" for official service, is chargeable to a district attorney under those statutes.

The attorneys for the Government in their brief in No. 289, pages 14 and 15, maintain that the phrase "and all the necessary expenses of his office" to be included in the returns of the district attorney required by Sec. 833 R. S. and the same phrase in Sec. 835 R. S., fixing the sum to be retained by him, means the expenses of the room or place in which he conducts his business; and they say it is necessary that the statute, to justify the contention of counsel for the claimant, that the traveling expense of a district attorney is "necessary expense of his office," should have provided "necessary expenses *of his official position*." If the construction which the attorneys for the Government have thus put upon the phrase "necessary expenses of his office," used in Secs. 833 and 835, cannot be maintained, and it cannot be, then there is a complete failure on the part of the Government to show that the allowance for travel should be included in the $3,500 which is to be paid to the claimant over and above his expenses.

The attorneys for the Government make substantially the same claim in their brief for appellee in No. 345 as to per diem, and this reply shall apply to both mileage and per diem charges. If the phrase "necessary expenses" used in the two sections means only the necessary expenses of the room or place of business, then these two items cannot be retained by the district attorney over and above the $3,500. But, if the phrase means the necessary expenses of the office of district attorney, then the argument of the attorneys for the Government fails and both must be allowed in addition to the maximum of $3,500. In Sec. 833 the word "office" is twice used. The district attorney must make returns of all the fees and emoluments of *his office*. No other meaning can be given to this word as here used than "official position." This is followed by the phrase and "of all the necessary expenses of his office." The word "office" as here used must mean

exactly the same as the same word used in the next preceding line of the same section. There is no canon of construction better established than that the same word used in the same law twice must be construed alike—expenses of his office in this section must mean expenses of his official position.

Section 833 prescribes the return which is to show the earnings of the district attorney. Sec. 835 prescribes that the pay, provided the earnings will permit, shall be $6,000 (New Mexico, $3,500) "over and above the necessary expenses of his office." The term "necessary expenses of his office" is used in both sections—the first to prescribe the return and the last to fix his pay *with reference to the return*—and of necessity the same meaning must be given to this term in both sections, and the district attorney must be allowed to retain $3,500 over and above "all the necessary expenses of his office," of his position as district attorney. Now, if traveling in discharge of his duty entailed expense on the district attorney, this constituted a part of the "necessary expenses of his office." But counsel for the Government contend that if this be so as regards the *actual expense* of travel, it is yet not true of mileage. The mileage of the statute (Sec. 824) is nothing more nor less than an agreement between the Government and the district attorney that the expenses of his travel, whether they amount to more or less, shall be settled at a certain rate per mile. He is allowed, by the terms of Sec. 824, "for traveling from the place of his abode to the place of holding any court," &c. It is *necessary* for him to go and the expense of going and coming is "necessary expense of his office."

Now, whether this is provided for in Sec. 824 under the heading "fees" or not, it is provided in Sec. 835 that this necessary expense shall be allowed the attorney and not included in his $3,500.

All that is required in fixing his pay in Sec. 835, is to ascertain what have been his necessary expenses, whether actual expenses or expenses commuted by statute.

This argument applies also to the per diem charges.

It will be conceded that the district attorney could not attend a court away from his abode without necessary expense; whether the claimant's abode was at the place where any court was held or not does not appear. But in lieu of actual expenses the Government, by law (Sec. 824), has fixed what those actual expenses shall be and, whether they be more or less, it is agreed by law they shall be fixed at a certain sum, whether at the place of his abode or elsewhere. And, like the mileage, this is fixed to avoid the keeping on the one hand and the auditing on the other of long accounts of many small items. The attorneys for the Government ask why the district attorney is allowed a per diem for attending court at the place of his abode. The answer is that the Government fixed beforehand, by statute, what would cover necessary expenses in that line and, by law, provided that this per diem should apply as well to courts at the place of his abode as to those held elsewhere—*Ita lex Scripta est.*

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